No. 15424

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOX WEST COAST THEATRES CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, AND LOEW'S INCORPORATED,

Appellants,

vs.

PARADISE THEATRE BUILDING CORP.,

Appellee.

BRIEF OF APPELLEE PARADISE THEATRE BUILDING CORP.

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Jurisdictional Statement.

The Statement of jurisdiction of appellants, Fox West Coast Theatres (hereinafter referred to as Fox West Coast), Loew's, Inc. (hereinafter referred to as Loew's) and 20th Century-Fox Film Corporation (hereinafter referred to as 20th-Fox), adequately states the basis upon which jurisdiction of the District Court and of this Court are based.

Statement of the Case.

The statement of the case and the statement of the facts by appellants are both inadequate and misleading so that a full presentation of these matters is required to be made by appellee.

The amended complaint alleged that the appellants (together with the Warner, Universal and Paramount defendants) injured appellee in its business and property

by reason of their violation of Sections 1 and 2 of the Sherman Act (15 U. S. C., Secs. 1 and 2) [R. 26-36].

Section 4 of the Clayton Act (15 U. S. C., Sec. 15) provides that any person injured in his business or property by reason of anything forbidden by the antitrust laws may recover damages therefor, trebled under the statute, together with costs, including a reasonable attorney's fee. The complaint alleged that the injury to the operation of the Paradise Theatre in Westchester, which is part of the City of Los Angeles, was occasioned by the violation by these defendants of the antitrust laws, in that they were alleged to have entered into a combination and conspiracy to monopolize and unreasonably restrain trade and commerce in the distribution and exhibition of motion pictures in Los Angeles and in particular in the Westchester area of Los Angeles, which combination and conspiracy injured the Paradise Theatre and caused the Paradise to lose in excess of $38,000.00 in the period of a single year and by causing the Paradise Theatre to lose profits which, in the absence of the conspiracy, it would otherwise have earned [R. 34-37]. The jury returned a verdict against Fox West Coast, Loew's and 20th-Fox in the amount of $20,000.00, which amount was some $18,000.00 less than the total loss by the Paradise in its first year of operation. In accordance with Section 4 of the Clayton Act (15 U. S. C. 15), the court trebled the damages awarded, entered judgment for appellee's attorney's fees and costs[1] [R. 153].

Appellants' motions for a directed verdict and motions for judgment, notwithstanding the verdict, were denied [R. 169]. Each of the appellants made a motion for a new trial, which were denied [R. 175]. In denying the motions for judgment notwithstanding the verdict, and in denying the motions for new trial, the trial court held

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[1]The reduction and apportionment of attorneys fees and costs are the subject of a cross-appeal by appellee.

that the verdict was consistent with the evidence, should not be set aside and that no new trial should be granted [R. 157, 173].

Appellants then filed this appeal. In their statement of Points on Appeal, appellants attacked the judgment wholesale. They alleged not only that there was no substantial evidence to sustain it but, in general terms, that many errors were made in connection with admission of evidence and in connection with instructions to the jury [R. 2879]. In the specifications of error contained in appellants' opening brief, appellants have abandoned all of the points alleged in their Statement of Points on Appeal except that they assert that the verdict of the jury is not supported by substantial evidence and that the trial court erred in a single particular with respect to certain jury instructions.

The questions presented therefore are (1) whether there was substantial evidence in the entire record considered as a whole, giving to all the evidence the reasonable inferences most favorable to appellee, to sustain the jury's verdict based upon a special finding that "defendants, Fox West Coast, Loew's and 20th-Fox had engaged in a conspiracy with each other to monopolize and unreasonably restrain interstate commerce in the licensing of motion pictures to plaintiff for exhibition in the Inglewood-Westchester area on a 7-day run during the period from September 18, 1950, to September 17, 1951," and that appellee was injured thereby.[2] (*Gunning v.*

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[2]A special interrogatory went to the jury which included the names of all of the defendants, *i. e.*, Universal, Paramount, Warner Bros., National Theatres Corp., Fox West Coast, Loew's and 20th-Fox [R. 2801]. The jury struck the names of all defendants other than Fox West Coast, Loew's and 20th-Fox [R. 2846]. Its verdict was to the same effect [R. 2849]. The jury also answered in the negative special interrogatory No. 1 as to whether any of the defendants had engaged in a conspiracy with each other to monopolize or unreasonably restrain interstate commerce in the licensing of motion pictures for exhibition on Los Angeles first run [R. 2845].

Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 234, 74 L. Ed. 720.) (2) Whether, in light of the jury's specific finding that appellants, Fox West Coast, Loew's and 20th-Fox, had participated in the conspiracy alleged, there was prejudicial error in the modification of defendant's proposed instructions 26, 21-A, 34, 31 and 11 by the addition of the words, "in the absence of a conspiracy."

ARGUMENT.

The appeal, with the exception of the alleged error as to certain instructions, is an appeal from a jury decision on a question of fact. There were some 17 witnesses called to testify at the trial, which lasted approximately 7 weeks, and over 300 documentary exhibits were introduced by both sides. The transcript covers some 2883 pages. Necessarily, however, in an appeal based upon the contention that verdict is not supported by substantial evidence the parties are compelled to describe the evidence in the record. With this in mind, we offer our apologies in advance for the unavoidably lengthy summary of the testimony of the witnesses and the documentary evidence in the case as it was tried below.

I.

Background of the Conspiracy.

Appellee, Paradise Theatre Building Corp., was organized in 1949. It was a family corporation in which Alex Schreiber, his wife, and his son, Max Schreiber, were sole stockholders. The corporation was organized for the purpose of owning and operating a theatre in the Westchester area in the City of Los Angeles. The outlines of that area are in appellant's Exhibit X attached to their brief. The Schreiber family invested in excess of $350,000.00 for the land, building and equipment of the Paradise Theatre [R. 1069-1070].

At the time the Paradise was constructed in the center of the Westchester district, its only immediate competitor

was the Loyola Theatre, owned and operated by appellant, Fox West Coast. The facts surrounding the construction of the Loyola Theatre and the period immediately prior thereto were described at the trial by the witness, Marco Wolff [R. 1480].

A. Fox West Coast Excluded Competitors from Westchester.

The witness, Marco Wolff, testified that in 1944 or 1945 he had a conversation with Charles P. Skouras, president of Fox West Coast, concerning the erection of a theatre in the Westchester district [R. 1480-1488]. The district was "a little undeveloped" [R. 1482] at the time, but later was to become one of the primary theatre revenue districts in the City of Los Angeles. Wolff tried to interest Skouras in going into a theatre in the Westchester district with him because at that time Wolff and Fox West Coast were partners in the Fifth Avenue and Alto theatres on the east side of Inglewood.[3]

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[3]The partnership was the subject of a lawsuit in which Fox West Coast contended that the partnership agreement pertaining to the Fifth Avenue Theatre and the Alto Theatre violated the antitrust laws and was subject to divestiture pursuant to the decrees in *United States v. Paramount, et al.,* and should be dissolved. (*United West Coast Theaters Corp. v. Southside Inc.,* 178 F. 2d 648.) In this court, two of the appellants, Fox West Coast and 20th-Fox, represented by their same counsel as represent them in this case, asserted that the joint venture agreement pertaining to the Fifth Avenue Theatre was an illegal pool by reason of the decision in *United States v. Paramount, et al.,* 70 Fed. Supp. 53, 67. There the special three-judge expediting court held that certain operating agreements between the major theatre circuits (including National and Fox West Coast) and independent exhibitors were unlawful because "the effect is to ally two or more theatres of different ownership into a coalition for the nullification of competition between them and for their more effective competition of theatres not members of the pool." (70 Fed. Supp. 53, 67.) United West Coast Theatres Corp., one of the formal parties plaintiff in that case, also controlled substantially all of the other theatres in Inglewood, including Academy, United Artists, Inglewood and Fox Inglewood. Inglewood was cleary a monopoly town created by illegal ventures.

Skouras informed Wolff, on behalf of Fox West Coast, that they were not interested in the Westchester district for a theatre location at that time and told Wolff that he should not go into that district [R. 1482]. Skouras told Wolff that he objected to his "invading that territory" [R. 1486] just as he had previously objected to Wolff's invading the territory in which the Fifth Avenue Theatre had been built, which had been "resolved" by a partnership [R. 1486].[4] Wolff asked Skouras if he would permit him to go into the Westchester district by himself and Skouras objected to it [R. 1483].[5] Shortly after Skouras, the Fox West Coast president, had prevented Wolff from invading the Westchester territory by erecting a theatre, Fox West Coast itself acquired the land on which, in 1946, it opened the Loyola Theatre. The trial court rejected appellee's Exhibit 33-B, marked for identification and transmitted to this court, with respect to the acquisition of the Loyola property by Fox West Coast, which would have shown that in acquiring the Loyola site Fox West Coast obtained from the seller, who at that time controlled substantially all of the undeveloped property in Westchester, a written agreement that the seller would not sell any land which it owned for use as a theatre for a period of 5 years or until 7000 units were constructed in the Westchester area. This exhibit established that the intended effect of the agreement was to exclude the possibility of any outside theatre owner from constructing a theatre in Westchester. Appellee was

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[4]This was the partnership between the Fifth Avenue and the Alto Theatres. (*United West Coast Theatres v. Southside Inc.*, 178 F. 2d 648.)

[5]Wolff testified that in those days and in subsequent days it was not considered good business to go into opposition with the big circuits without their permission. The witness, in answer to the court's questions, testified that this conversation was "friendly" in the sense of personal relationships, but certainly not with respect to business relationships [R. 1508].

directly affected by this restriction because when it acquired the Paradise property in 1947, it was thereby precluded from constructing a theatre until 1950 [R. 99-101; Pltf. Ex. 33(a) for identification].

Having thus excluded and prevented all competition from Westchester for five years, Fox West Coast then carved out this district as its own. The Fox West Coast Loyola Theatre was constructed in 1946 [R. 376]. Opened in October, 1946, the operating policy from the day it opened was an availability of Los Angeles first run in Westchester, exhibiting simultaneously on "day and date" with other first run theatres in Los Angeles [R. 377]. Los Angeles first run availability was the privilege of exhibiting feature motion pictures on the date of their first exhibition in the entire Los Angeles area simultaneously with other theatres. The Loyola policy of simultaneous first run exhibition in which it had equal "availability" with all of the other first run theatres in the City of Los Angeles and on which it played *"day and date"* or simultaneously with such other theatres was part of a policy which had been long established in Los Angeles.

B. Day and Date Exhibition in the Los Angeles Area.

In the Los Angeles area it had long been established that motion pictures should be exhibited simultaneously in groups of theatres. A study showing the exhibition of every motion picture distributed by the 8 major companies during the years from 1945 through 1951, covering at least 1500 pictures, showed overwhelmingly that day and date exhibition was the rule [R. 217-219; 749-756; 757-769; 796-802; Pltf. Exs. 46(A-4) to 46(A-17) and 54]. This "day and date" exhibition was the policy not only on first run but on the 7 day run, which commences 7 days after conclusion of the Los Angeles first run; on the 14 day run, which is a run commencing 14

days after the conclusion of Los Angeles first run; and on the 21 day run, which is a run which commences approximately 21 days after the conclusion of Los Angeles first run [R. 220, 536].

Simultaneous exhibition in Los Angeles was consistent with the recognition of the wide dispersion of the Los Angeles population, of the commercially recognized fact of convenience to patrons who thus would not have to travel long distances to early run theatres, of good business judgment for distributors who could take advantage of the first run advertising to get patrons into first run in higher admission theatres and to early 7 day run theatres for the same purpose, and was to the advantage of the exhibitors who were able to play motion pictures at a time when the advertising and exploitation were in the forefront of the public mind [R. 1928-1931]. The Loyola theatre played literally hundreds of pictures day and date or simultaneously with other first run theatres [Pltf. Exs. 46A-6 and 46A-14].

On the 7 day run in the Los Angeles Metropolitan area, there were many Fox West Coast theatres located throughout the metropolitan area, in such areas as Belvedere Gardens, Inglewood, Glendale, Pasadena, Westwood, Wilmington, which exhibited simultaneously on the 7 day run. In Inglewood, the Fox West Coast Academy (4.5 miles from the Paradise), the Fox West Coast Fifth Avenue (4.8 miles from Paradise), and Fox (2.9 miles from the Paradise) operated on the 7 day run and Marco Wolff's Southside (6.9 miles from the Paradise) exhibited many pictures day and date with these theatres on the 7 day run [R. 1506, 2480]. The La Tijera (2 miles from the Paradise) and Imperial (5.2 miles from the Paradise) also exhibited many pictures simultaneously with each other on the 7 day run [R. 879; 2521-2522].

C. Patronage Potential in Westchester for Early Runs.

The theatre patronage potential of Westchester for early runs was graphically shown by the evidence that the Loyola Theatre in the Westchester district was one of the most successful theatre operations in the entire Fox West Coast Theatre Chain. This was the statement of Joseph Schenck, an executive of the 20th Century Fox, in charge of its studios, and a theatre partner of Fox West Coast in approximately 55 theatres throughout the State of California and in Inglewood [R. 1092]. The evidence showed that the Loyola, operating on Los Angeles first run availability in Westchester, was at the same time a neighborhood theatre [R. 218-219]. Its tremendous patronage was drawn substantially from within a four-mile radius [R. 1959]. Westchester was a special, highly successful theatre patronage area for early runs. The evidence showed that the Loyola Theatre in Westechester, exhibiting the same motion pictures on the same days as the Fox West Coast Uptown Theatre [Pltf. Exs. 46A-6, 46A-14], located at the nexus of the downtown and Wilshire District, had grossed more than that theatre continuously [R. 256, 257; Pltf. Exs. 79, 84], despite the fact that the Uptown had a larger seating capacity than the Loyola [Pltf. Exs. 79, 84]. The Loyola in Westchester was superior in its grossing potential to over half of the other Fox West Coast theatres, whether located on Hollywood Blvd., Wilshire Blvd., or in other first run districts [R. 255-257; Pltf. Exs. 79-84]. This theatre regularly returned more theatre profit to Fox West Coast than did the Grauman Chinese Theatre, a so-called world famous theatre on Hollywood Blvd. [R. 2547-2548; Pltf. Exs. 79, 80]. Anually, theatre profits from the Loyola ranged from approximately $86,000.00 to $142,000.00 [R. 2547].

It was significant that Fox West Coast chose Westchester to exhibit first run pictures, particularly those of

its parent corporation, 20th-Fox, although Fox West Coast at the same time was operating theatres in Inglewood, Belvedere Gardens, Pasadena, Glendale, Santa Monica, Ocean Park, Redondo Beach, in which it did not choose to play such first run pictures.

The evidence established that the potential of the Westchester area from early run from a theatre point of view was supported by (1) the fact that the area had only one and, after the Paradise was built, then only 2 theatres in central Westchester surrounded by a theatre-going public of 40,000 within an area of two miles [R. 1820]; and (2) the fact that these theatres were contemporary, comfortable modern theatres.

In contrast, the Inglewood area, an older suburban development, prior to 1949 had six established theatres. While, in 1950, within a two mile radius of the Fox West Coast Academy Theatre there were 102,000 people [R. 1821], there were also 7 theatres to share that population (see Appellant's Ex. X attached to Appellant's Brief.)

The evidence showed that the Loyola policy in Westchester was to exhibit on a simultaneous Los Angeles first run in Westchester. It exhibited, however, almost exclusively 20th-Fox pictures, although at one time or another the pictures of every distributor were exhibited in the Loyola on Los Angeles first run availability [Pltf. Ex. 53]. However, there was no theatre in Westchester exhibiting the pictures of Loew's, Universal, Warner Bros., Paramount, Columbia, United Artists, RKO, etc., on Los Angeles first run when the land for the Paradise theatre was acquired or when the theatre opened its doors. None of these distributors had first run outlets in West-

chester. Moreover, not a single distributor's pictures were being exhibited on a 7-day run in the heart of Westchester. Thus, this patronage pool on the 7 day run was untapped.

D. The Paradise Was Excellently Suited for First Run or Seven-day Run Operation.

It was established that the type of construction, the equipment and the furnishings of the Paradise Theatre were all designed with the express intention early run operation [R. 1065]. It was established that the timeliness of exhibiting motion pictures in a theatre such as the Paradise during the period 1950-1951 was of crucial importance to the success of theatre operation. This was true because in the distribution of motion pictures the impact of first run advertising wears off quickly, and as pictures left their first run exhibition, advertising and exploitation turned to new pictures and not to older ones. Thus while the advertising expended on the first run was many thousands of dollars [R. 417-418], advertising on the second run is contained in the small box advertising of theatre guides in newspapers [R. 1687-1688]. Therefore, the ability to obtain early run pictures was vital to the success of the Paradise.

Moreover, its major competitor, the Loyola, had established itself as a first run theatre in the area. The pictures being exhibited at that theatre were top quality pictures. The only way in which the Paradise could be successful would be to obtain the same quality of pictures regularly on the 7 day availability when the pictures were fresh and new.

II.

There Was Substantial Evidence of a Conspiracy Among Appellants to Unreasonably Restrain and Monopolize Trade in Licensing Motion Pictures to Appellee on the Seven-day Availability in Westchester.

As the Proximate Result of That Conspiracy (1) Appellee Was Excluded From Obtaining Motion Pictures for Exhibition on a Seven-day Availability Day and Date With Inglewood; (2) Appellee Was Excluded From Obtaining Motion Pictures on a Seven-day Availability on Any Terms.

Appellee opened its theatre on August 23, 1950. However, as early as April, 1949, Joseph Schenck, an executive of 20th Century Fox and President of United Artists Theatre Circuit, and at that time a co-venturer with Fox West Coast, was discussing with appellee's president the possibility of putting Loew's pictures in the Paradise on Los Angeles first run on condition of the acquisition of a 70% interest.[6] In March and April, 1950, appellee made his first contact with appellants Loew's and 20th-Fox, and the other major distributors, in order to acquire pictures for the impending opening of the Paradise [R. 1122-1159]. The damage period in this case is from September 23, 1950, to September 22, 1951. Thus prior to a detailed consideration of the testimony as to the attempts of the Paradise to obtain motion pictures, it is material to consider the evidence as to the agreement and relationships between the appellants and others which began prior to the opening of the theatre and which existed throughout the damage period.

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[6]See discussion of this occurrence page 21.

The president of appellant, Fox West Coast, testified that as of 1949 the Academy, Fox, United Artists and Inglewood Theatres, all located in Inglewood, were being operated by a corporation known as United West Coast Theatres Corporation. That corporation also owned the Fifth Avenue Theatre. United West Coast Theatres Corporation operated approximately 55 theatres throughout the State of California [R. 317]. The organization of that corporation had been accomplished by Fox West Coast Theatre Corporation, and United Artists Theatres, Inc., and United Artists Theatres of California, Ltd. [R. 317]. The signatories to the agreement were Charles P. Skouras and John B. Bertero for Fox West Coast Theatres Corporation, and Joseph M. Schenck for United Artists Theatres of California, Ltd. The agreement setting up the corporation was introduced into evidence as Plaintiff's Exhibit 31F.

The testimony of the witness, Bertero, and Exhibit 31F showed that in addition to the theatres in Inglewood United West Coast Theatres Corporation, in 1949, operated the Egyptian Theatre on Hollywood Boulevard; the Four Star, El Rey and Ritz on Wilshire Boulevard. In the suburban communities, that corporation operated 7 day run theatres in Pasadena, Glendale, Belvedere Gardens and it operated first run theatres in Long Beach, California [R. 317-322].

The corporation was owned in 1949, 70% by appellant, Fox West Coast, and 30% by United Artists Theatres of California, Ltd., a subsidiary of United Artists Theatre Circuit, Inc. [R. 316-317]. The president and controlling owner of United Artists Theatres of California, Ltd., and United Artists Theatres of California, Inc., was

Joseph M. Schenck, the brother of Nicholas Schenck, president of Loew's, Inc. This same Joseph Schenck was an executive of appellant 20th-Fox [R. 280, 1071]. Fox West Coast and United Artists Theatres Circuit, Inc., were required to terminate their joint interests in the United West Coast Theatres Corporation.[7]

From the Spring of 1948 to the end of 1949, appellant, Fox West Coast and UA Theatre Circuit, Inc., and Joseph M. Schenck, who had the dual role of executive of 20th-Fox and partner with appellant, Fox West Coast Theatres, were negotiating for the termination of their jointly owned theatre interests in United West Coast Theatres Corporation [R. 322-324; 344]. The termination involved the return to the various parties, subject to some adjustment, of the theatres which each of them had contributed to the pool, as set forth in Exhibit 31F.

The testimony of Bertero and Plaintiffs' Exhibit 31F, pages 34-43, shows that these theatres were located, in many cases, in the same city, so that ostensibly when United West Coast Theatres was dissolved they would be operated in competition with each other. A typical example was Inglewood, where United Artists Theatres had contributed the United Artists Theatre and it was returned to it, while the Academy, Fox and Inglewood were returned to Fox West Coast.

However, in anticipation of the termination of the joint interests and the imminence of "competition," the evidence showed the following agreements entered into

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[7]Their joint interests were held to be unlawful in *United States v. Paramount, et al.*, 70 Fed. Supp. 53, 67.

between Fox West Coast, United Artists Theatre Circuit, Loew's, Inc., 20th-Fox and others:

(a) Fox West Coast, Loew's and United Artists Theatres agreed that in non-bidding situations throughout the State of California, wherever Fox West Coast, and United Artists Theatres would have theatres that would normally be in competition with each other, Loew's product would be licensed to the United Artists Theatres and Fox West Coast would not compete for it [R. 626-638];

(b) The parties would agree as to the allocation of all distributors' product [R. 637-638]. Thus, Bert Pirosh, the chief buyer for Fox West Coast, testified that in a meeting with a representative of UA Theatres, Pat DiCicco, DiCicco outlined each town and each theatre and certain distributors he wanted and Pirosh did the same. The distributors, where necessary, were contacted for approval [R. 638-639].

Thus, the evidence was clear that all the distributors were directly involved in the arrangement.

Specifically, with respect to Loew's, Pirosh testified that DiCicco had informed him he had discussed the matter with the Loew's sales manager, Hickey, and that Hickey was agreeable [R. 630-637]. In Inglewood, DiCicco had asked Pirosh not to bid against United Artists Theatres and Hickey of Loew's agreed to that arrangement [R. 601-604]. Pirosh testified that he checked with Hickey as to his conversation with DiCicco about Loew's product and Hickey was agreeable [R. 631-634; 636-637].

Corroboration of this arrangement between the parties, if such corroboration was necessary, was clearly dem-

onstrated by the testimony of Hickey, Loew's Pacific Coast Manager. He testified that he and Edwin Zabel, who was then the chief buyer for Fox West Coast, agreed to switch the Loew's product from three theatres in which Fox West Coast then had an interest, *i. e.,* the Egyptian,[8] Los Angeles and Wilshire, to the two other theatres which the United Artists would obtain an interest in, *i. e.,* the Egyptian and Loew's State [R. 405-410].

Further corroboration came from testimony by Alex Schreiber as to conversation with Joseph Schenck, the executive of 20th-Fox, and the head of UA Theatres. They had a meeting in March, 1949, when Loew's product was being exhibited in the Wilshire, Egyptian and Los Angeles theatres, and Schenck informed Schreiber then that Loew's product would be exhibited in the Egyptian and Loew's State [R. 1091]. The transfer as predicated took place in November, 1949.[9]

During the first so-called "bidding" period in Inglewood, commencing in September, 1949, Pirosh testified that he, on behalf of Fox West Coast, and DiCicco, on behalf of UA Theatres, agreed that Loew's product would go to the United Artists Theatres and they would not bid against each other for that product. Hickey was agreeable [R. 601-604]. In fact, during this so-called "bidding" period, each and every distributor, *i. e.,* Loew's, 20th-Fox, Paramount, Warners, Universal, Co-

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[8]The termination of Fox West Coast interest in the Egyptian was as of January 1, 1950 [R. 323-324].

[9]Irving Epsteen, an employee of Fox West Coast, was put on the witness stand and was not even asked by appellant, Fox West Coast or 20th-Fox, to deny the testimony. The conversation with Schenck was established without contradiction [R. 2515-2518].

lumbia, RKO, United Artists, agreed to a complete allocation of the exhibition of pictures on 7 day run in the Inglewood area. The allocation was as follows:

Distributor	Exhibitor	Availability[10]	Record Cit.
WARNER BROS.	La Tijera & Imperial	7 da-LA day and date	[R. 606-608; 616-617].
COLUMBIA	*Split* between La Tijera & Fox West Coast Academy	7 da-LA (a) La Tijera & Imperial day and date (b) Academy exclus.	[R. 2521-2522; Pltf. Ex. 46 A-9].
COLUMBIA	(a) La Tijera to Fox West Coast 5th Ave. (b) Fox West Coast Academy to Fox	Move-over Move-over 7 da-LA day and date	[R. 2521-2522; Pltf. Ex. 46 A-9].
RKO	La Tijera-Imperial	7 da-LA day and date	[R. 607-608; 616-617].
UNIVERSAL	*Split* La Tijera-Fox West Coast Academy	7 da-LA (a) La Tijera & Imperial day and date (b) Academy exclus.	[R. 611-614, 622; Pltf. Ex. 51].
PARA-MOUNT	Academy	7 da-LA exclus.	[R. 609-610].
20TH-FOX	Academy	7 da-LA exclus.	[R. 609].
LOEW'S	United Artist	7 da-LA exclus.	[R. 601-604].

This arrangement arose out of the agreement with Fox West Coast and United Artists Theatres and La Tijera Theatre. Distributor participation in the arrangement, which is self-evident from the simple fact that it would be impossible to carry out the arrangement without their direct knowledge and participation, was testified to directly by the Fox West Coast manager, Pirosh. He tes-

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[10]Abbreviations are "7 day-LA" for 7 days after Los Angeles first run closing; "Day & Date" for simultaneous exhibition in theatres named; "Exclus" for exclusive 7 day run; "move-over" means completing exhibition in one theatre and starting in another without any elapse of clearance time; "split" for division of pictures of a distributor between two exhibitors.

tified that there was a discussion with Loew's [R. 630]; that he talked with the sales managers of Warner Bros. and RKO [R. 624-626]. He first denied and then admitted discussions of the "split" with Universal [R. 611, 622]. The Columbia Branch Manager testified by stipulation as to conversations with Fox West Coast and the La Tijera [R. 2521-2522]. The Universal records themselves provided the reference that an agreed division of product had been arranged [Pltf. Ex. 51; R. 611-614, 869-875]. The jury was not only required, but compelled to come to the conclusion that this was a total arrangement between Fox West Coast, United Artist Theatres and the distributors in the area to allocate 7-day run pictures in the Inglewood area. Moreover, the record was clear that the distributors carried out this arrangement secretly by maintaining a facade of "bidding letters"; that is, even though each of these distributors *knew in advance* that a particular theatre was the theatre that would obtain the picture, it sent out offers to all theatres. Thus, Fox West Coast received bid letters from Columbia although the branch manager of Columbia testified that there was an agreement not to compete [R. 2521-2522]. The same was true as to Loew's. Each of the distributors sent out bid letters, although each of them knew that the allocation had been arranged.

As was set forth above, this arrangement commenced in September or October, 1949. Subsequently, Hickey, the Pacific Coast Manager of Loew's, admitted, under cross-examination, that as of 1950 and 1951 Fox West Coast and United Artist theatres and others agreed, throughout the State of California, *wherever there was bidding,* that the exhibition of motion pictures should be allocated between them [R. 543-553].

Hickey discussed these agreements with Pirosh, of Fox West Coast; Fred Stein, of United Artists Theatre Circuit, and Leo Miller, the buyer for Warner Bros. [R.

553]. He testified that records were kept in his office of the conversations because "when these men left his office notes were made of what they said" [R. 550]. He testified that "each and every one of these men" told him personally that they were conforming to these arrangements and that they not only did it in Los Angeles but did it all over the state, *wherever there was bidding* [R. 550]. His testimony was that the arrangement covered every picture and that these men had been in his office to discuss the arrangement not once but a dozen times [R. 551]. When it was not discussed in his own office, it was discussed on the telephone [R. 552].[11]

The Fox West Coast witness, Zabel, also testified as to the distributor participation in such arrangement at that time—1950-1951 [R. 257-263].

Pirosh, the Fox West Coast sales Manager, corroborated this arrangement. He testified that in Inglewood he discussed the bidding with the United Artists Theatre Circuit representative, Fred Stein [R. 649].[12]

The evidence was uncontroverted that on the 7-day run all of the 7-day areas were controlled by Fox West Coast. The Loew's witness, Hickey, testified that they were all Fox towns [R. 537]. This included Pasadena, Huntington Park, Glendale, East Los Angeles, Culver City, Westwood. Inglewood. In each of these areas, Fox West Coast and United Artists Theatres, or Fox West Coast and Warner Bros., together with the distributors, allocated 7-day run pictures. Thus, Pirosh testified that Warners had competing 7-day run theatres in Hunting-

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[11]The date when these arrangements commenced was established as the date when "bidding" commenced on first run in June 1950 [R. 597-598].

[12]As to the discussion of the *amount* of each bid, Pirosh made the following statement: "I am *practically* positive that I did not ask Mr. Stein what he was going to bid on any of *his* pictures—any pictures." (Emphasis supplied.)

ton Park, San Pedro and Beverly Hills; that "customarily" Fox West Coast would play the product of certain distributors and Warners would play the product of other distributors [R. 641]. With respect to one distributor, RKO, the arrangement was that Fox West Coast would obtain 75% of the pictures and Warners 25% [R. 645-647]. The division was arrived at by agreement between him and Leo Miller, the Warner's representative. (Note: This same 75/25 division of RKO pictures on the 7-day availability applied to San Pedro and Beverly Hills [R. 645-647].)

The testimony by Hickey, hereinabove referred to, established the facts as to arrangements between Fox West Coast, Warner Bros., United Artist Theatres and the distributors when "bidding" commenced [R. 543-553].[13]

In those 7-day run situations such as Pasadena, Glendale and Inglewood, where Fox West Coast and United Artist Theatres Circuit were involved, the testimony by Hickey and the plain facts showed a conspiracy between the parties. There was direct testimony that Fox West Coast prevented any independent theatre from exhibiting simultaneously with any of its theatres in Los Angeles on first run. Thus, Zabel, the chief buyer of the entire National Theatre Circuit, testified that if Fox West Coast purchased a picture for a first run exhibition in downtown Los Angeles, no other theatre other than a Fox West Coast theatre was permitted to exhibit that picture at the same time [R. 278-279]. The record shows that the only other exception is that a United Artists theatre was, on occasion, permitted to play simultaneously [R. 255]. Thus, new first run areas were precluded by Fox West Coast.

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[13]Bertero, president of appellant, Fox West Coast, and a lawyer, admitted that the arrangements, such as were testified to by Pirosh and Hickey were unlawful [R. 364-365].

Similarly, the evidence was that when the appelleee opened the doors of its theatre and sought to license in Westchester a 7-day availability day and date with Inglewood, it was the Fox West Coast plan, adhered to by the distributors, which denied pictures on this 7-day availability to the Paradise.

A. The Impact of the Conspiracy Upon the Paradise Theatre.

Alex Schreiber testified that after he had acquired the land and had prepared the plans for the construction of the Paradise as an early run theatre in Westchester, Joseph Schenck, then chief executive of 20th Century-Fox Studios, and the head of United Artists Theatres Circuit, Inc., arranged for a meeting with Schreiber, Schreiber's son, Max, one Pat DiCicco, the executive in charge of United Artists Theatres, and Irving Epsteen, an employee of Fox West Coast. At that meeting, Schenck confirmed Schreiber's knowledge that the Westchester area was an excellent area for an additional theatre; that the Fox West Coast Loyola Theatre, exhibiting primarily 20th Century pictures, was one of the best theatres in the entire Fox West Coast chain. Schenck said they would put Loew's product on the first run Los Angeles availability in the Paradise Theatre day and date with the Grauman's Egyptian and Loew's State downtown and that they wanted a 70% interest in the theatre[14] [R. 1070-1092].

Max Schreiber corroborated the testimony of his father. He testified that Schenck had told them that their worries about pictures would be over. Schenck said that it would be better for the Schreibers if the Schreibers had 40% with the Schenck group than 100% interest by themselves because the Schreibers *"would not have any pictures."* Schenck further stated that *they had all the pictures and*

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[14]Schenck's proposal through Epsteen was 50%. It was raised to 60% and then to 70% [R. 1093].

could do whatever they wanted [R. 1671]. No witness was called by the defense to deny this testimony. Irving Epsteen, at the time of the trial, was still employed by Fox West Coast. He was called to the witness stand, and was not examined by the defense concerning the matter. As was pointed out by the trial Court, this testimony was never questioned. According to the statement of the defense, the court said, "they have not questioned his (Schreiber's) testimony" [R. 2518].[15]

Schreiber testified that at some time after he began construction of the Paradise, he had a conversation with Charles Skouras, president of the appellant Fox West Coast, in the presence of witnesses [R. 1100]. Skouras asked Schreiber why he built the theatre in his (Skouras') territory and he told Schreiber he should not have come into his (Skouras') territory. When Schreiber replied that the Westchester area was a growing area; that it could support two theatres; that the Paradise was intended as a theatre which would be a credit to the motion picture industry and when he pointed out that the Loyola Theatre was doing excellent business and that there were more than enough people to serve the area, Skouras' reply was that Schreiber should not come into his territory [R. 1102].

At a time when the Paradise Theatre was ready to open but was unable to obtain any pictures to open its doors, Zabel, the chief film buyer for Fox West Coast, talked with Max Schreiber and later with Alex Schreiber about acquisition of the Paradise [R. 1669, 1110-1112]. At that time Marco Wolff had been employed to attempt to

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[15]The proposed transaction was never concluded [R. 1098]. At the time that the agreements were to have been put in final form by the attorneys, Schenck and Charles P. Skouras were meeting in Florida to negotiate termination of the United West Coast Theatre matter [R. 1663]. After this meeting with Skouras, Schenck took no further steps to complete the deal with Schreiber.

obtain pictures for the Paradise. Zabel joined in the statement to Alex Schreiber that Wolff would never obtain 7-day availability pictures for the Paradise [R. 1112] but that if the acquisition was accomplished, that there would be no trouble in obtaining 7-day pictures for the Paradise [R. 1669]. Zabel was not called by appellants to controvert this testimony although he was in the courtroom and employed by Fox West Coast [R. 189].

At a subsequent conversation with Skouras, in the presence of his general manager, George Bowser, Skouras (1) attempted to purchase the Paradise on condition that "the price must be cheap" [R. 1105] and repeated the statements that had been made to Schreiber by the 20th-Fox executive and Fox West Coast partner, Schenck [R. 1671], and by the chief film buyer of Fox West Coast, Zabel [R. 1112], that the Paradise *would not get pictures.* Appellants did not call Bowser to controvert this testimony.

This evidence that Schreiber had built his Paradise Theatre in territory that "belonged" to Fox West Coast and that as long as he retained the theatre he would not be able to obtain early run pictures was borne out by the facts.

During the period from February, 1950 to August 23, 1951, the Paradise Theatre was represented in negotiations with appellants Loew's and 20th Century and the other distributors of motion pictures by four different individuals. The first was appellee's president, Alex Schreiber; the second was an attorney from the City of Chicago, Ill., Seymour Simon; the third was an exhibitor with some 40 years of experience in the motion picture industry, Marco Wolff (the same Marco Wolff who had been prevented from building the theatre in the Westchester District by Charles Skouras in 1944); the fourth individual, representing the Paradise, was Sid Lehman, an operator of an independent buying organization.

From February, 1950, through August 23, 1950, appellee's president, alone, and sometimes with his son, Max Schreiber, or with his attorney, Seymour Simon, sought from Loew's and 20th Century-Fox and from Universal, Warners, Paramount, Columbia, RKO and United Artists the privilege of licensing motion pictures on a non-exclusive first run in the Westchester area. Each of these distributors flatly refused to negotiate on any terms for such a run for the Paradise Theatre [R. 1114-1173], and the Paradise Theatre, during the period August 23, 1950 to September 22, 1951, never exhibited a single motion picture on Los Angeles first run availability. The same request was made by Marco Wolff and by Lehman. All of these requests were uniformly rejected.

During the period of at least three months prior to the opening of the Paradise Theatre on August 23, 1950, Schreiber requested the opportunity to negotiate for a non-exclusive 7 day availability in the Paradise Theatre in Westchester, the same availability that was then being licensed to theatres of Fox West Coast and the United Artists Theatre Circuit and Warner Bros. theatres throughout the Metropolitan Los Angeles area. The same request was made by Marco Wolff to Loew's, 20th Century-Fox and to all other distributors [R. 1507]. The same request was made to all of the distributors by Lehman [Pltf. Ex. 7H]. Loew's, 20th Century, Universal, Warners and Paramount refused this request. RKO and Columbia likewise refused until approximately March of 1951, and United Artists until 1951. Thus, during the period from August 23, 1950 to September, 1951, the Paradise exhibited the following 7-day run pictures: Loew's 0; 20th Century-Fox 0; Universal 0; Paramount 1; Warners 3.

B. The Reason for the Refusal.

Marco Wolff, who negotiated with the distributors prior to the opening of the Paradise Theatre, testified that all of the distributors, including Loew's and 20th-Fox, refused the request of the Paradise to exhibit on a non-exclusive 7-day availability in Westchester because Fox West Coast refused to permit it and insisted on clearance over the Paradise [R. 1507].

The testimony by Wolff that the distributors refused to permit the Paradise to have an equal availability of 7 days after Los Angeles first run closing which Fox West Coast had for many of its theatres throughout the Los Angeles Metropolitan area because Fox West Coast insisted on clearance on behalf of the Academy over the Paradise, was corroborated by the witness Lehman, who took over the buying for the Paradise Theatre in January, 1951. Thus, Lehman testified concerning four written requests that he had sent to Universal to exhibit pictures on 7-day availability non-exclusive without clearance over any other theatre [R. 1563-1568; Pltf. Exs. 15, M, O, P, Q-1]. The last letter had to do with the Universal picture "Up Front." Lehman testified that he talked to Marriott, the Universal branch manager, who told him that the Universal picture "Up Front" would exhibit in the Academy Theatre in Inglewood on the 7-day availability. Lehman asked Marriott if the Paradise could play the picture day and date with the Paradise.

Marriott said that if Lehman could obtain permission from Fox West Coast, it would be satisfactory to him [R. 1567]. Lehman called Frank Prince, an assistant to Bert Pirosh, and told him that Universal was agreeable to playing the picture day and date with the Academy and requested Fox West Coast permission to play the picture day and date. Prince refused [R. 1567-1568].

Lehman testified that Cohen, branch manager at RKO, told him that on pictures that were purchased by the Fox West Coast Academy, Fox West Coast would not permit the Paradise to play on the 7-day availability simultaneously [R. 1583].

When a Columbia picture was licensed to the Fox West Coast Fifth Avenue Theatre and the Paradise was permitted by Columbia on *that* picture to exhibit simultaneously, Fox West Coast removed the picture from the Fifth Avenue program because the Paradise had been permitted to exhibit simultaneously [R. 1586-1587, 1613].

Marriott, the Universal branch manager, testified that Fox West Coast insisted on clearance over the Paradise [R. 1888; Pltf. Ex. 14k]. Marriott testified that Fox West Coast categorically refused to permit the Paradise to play day and date with the Academy. He testified that it was Fox West Coast that determined whether or not the Paradise would be permitted to play on a 7-day availability, whether or not it received the picture [R. 944]. Because of the pressure of Fox West Coast, Universal would never permit the Paradise to play day and date with the Academy [R. 943-945]. Marriott testified that Fox West Coast took the position that under no circumstances would they permit the Paradise to play day and date with their theatres [R. 949].

The Fox West Coast sales official, Bert Pirosh, testified he insisted on clearance over the Paradise Theatre [R. 707, 839, 843].

By reason of the position taken by Fox West Coast, each of the film companies executed agreements with Fox West Coast whereby clearance was granted over the Paradise Theatre [R. 457]. Thus, as a result of Fox West Coast action and adherence by Loew's and 20th Century-Fox and the other distributors, the Paradise was refused the opportunity to license motion pictures

on a non-exclusive 7-day availability in Westchester, and Fox West Coast, Loew's, 20th-Fox and other distributors entered into agreements whereby they bound themselves not to permit the Paradise Theatre to exhibit those motion pictures until a period of time after the conclusion of the 7-day run exhibition in Inglewood. Schreiber testified that as a result of these arrangements the Paradise was forced to operate for the 52-week damage period with pictures that had been exhibited in prior years, or with late availability pictures. On the rare occasion that the Paradise obtained a 7-day run picture from non-defendants Columbia and RKO, who generally produced inferior pictures, the Paradise, because it had no other pictures available, was required to play at least one-half of its program with late availability pictures. Moreover, the Paradise was compelled to hold over top features on second weeks and to bring in older pictures as a second feature, thus eliminating a great segment of its potential patronage [R. 1399-1403]. There was no contradiction of the testimony to the effect that the policy upon which the Paradise operated was damaging to its theatre and caused the loss that it suffered in the amount of approximately $38,000.00.

C. There Was Substantial Evidence That Pursuant to the Conspiracy, Appellant Imposed Upon the Paradise (a) Unreasonable Clearance and (b) the Unreasonable Requirement of So-called "Bidding" Against Non-competitive Theatres in Inglewood.

The jury was entitled to conclude that the refusal to license equal availability to the Paradise and the granting of clearance over the Paradise because of the position of Fox West Coast was unreasonable. Evidence was introduced which showed that Loew's refused to permit the Paradise to exhibit on a simultaneous 7-day availability in Westchester, even before the first picture was exhibited

in that theatre. In April, 1950, 20th-Fox refused to license any pictures [Pltf. Ex. 18C] and again before the theatre was opened. Universal, Warners, Paramount and Columbia all took the same position and all prior to the opening of the theatre. As of that date, of course, since the Paradise had not opened its doors and had not exhibited a single picture, Loew's and 20th-Fox had no knowledge whatsoever as to any of the factors which would permit them to make a reasonable decision. They refused to negotiate the terms for a single picture. In so far as 20th-Fox had any knowledge from the distribution of pictures in the Loyola Theatre, it was evident, of course, that the Paradise could pay tremendous film rental. The other distributors, including Loew's, if they knew about the Loyola operation, would have the same information, but in any event none of them ever requested the Paradise to negotiate any terms for a non-exclusive 7-day availability in Westchester.

As has been pointed out above, Fox West Coast insisted on clearance over the Paradise and the grounds stated by Fox West Coast were that the Paradise and Inglewood Theatres were in substantial competition. Loew's and 20th-Fox took the same position. But as of August 22, 1950, again none of these corporations had any knowledge as to whether the exhibition of a simultaneous 7-day availability in the Paradise would affect any theatre in Inglewood in any way. The Paradise had not opened its doors but each appellant took the position that the Paradise and Inglewood Theatres were in substantial competition. Moreover, evidence was introduced to show that each of the distributors was specifically requested to try out the Paradise by licensing the Paradise simultaneously with some theatre in Inglewood and thus to determine by actual facts whether there was any competition between the two. Each distributor refused [Pltf. Ex. 6m].

D. The Evidence That the Paradise and Inglewood Theatres Were Not in Substantial Competition.

Testimony of Alex Schreiber. Schreiber testified that from a theatre economics point of view, Westchester and Inglewood were separate areas; each had its own shopping centers; and each was self-sufficient to a considerable extent from a commercial point of view. The Paradise was separated from all of Inglewood by a railroad track and in addition was separated from the Academy and Fifth Avenue Theatres by a race track and a cemetery [R. 1181-1189].

Schreiber testified that Warners, Universal, Paramount, 20th Century-Fox, all permitted the Academy Theatre to exhibit pictures simultaneously with the Southside Theatre. Loew's did not grant clearance of the Academy Theatre over the Southside. The distance between the Academy and Southside Theatres was stipulated to be 3½ miles while the Paradise was 4½ miles from the Academy.

Testimony of Marco Wolff. Marco Wolff testified that in his opinion the Paradise was not in substantial competition with any of the theatres in Inglewood, or with the La Tijera. He was the operator of the Southside Theatre and he testified that it was proven that the Southside, 3½ miles from the Academy, could be a successful theatre playing most of its pictures simultaneously with the Academy Theatre [R. 1506].

Wolff testified that Fox West Coast wanted clearance at the Academy over the Paradise, but did not ask for clearance over the Southside [R. 1507] although the Paradise was farther from the Academy than the Southside. Wolff testified under the court's questioning that the distributors *would not* sell pictures for Paradise where they *would* at the Southside because the Fox Theatres in Inglewood had demanded clearance over the Paradise [R. 1509].

Wolff testified that the Westchester area as of the date of his testimony was a larger area than the Southside area and as of 1950-51 "pretty well developed" [R. 1515].

In that area, Wolff testified that all of the film companies had always played more than 7-day runs in Inglewood. Wolff testified that the Cemetery is between Inglewood and Academy and Fifth Avenue [R. 1527] and a large undeveloped area between downtown Inglewood and the Paradise [R. 1527]; that by adding a run with the United Artists Theatre in Inglewood the drawing area of the two theatres would be increased by approximately 50-75% and that this would multiply the film rental by anywhere from 2½ to 3 times. Thus, as an example, if a theatre operator on an exclusive run would gross $4,000.00, with three runs, the gross on those three runs, playing day and date, would be $10,000.00, or on a separate picture, $12,000.00. Wolff testified that by adding day and date runs you increase the drawing area and the patronage is only cut up in a very small degree, and he testified to those facts on that basis of his own experience [R. 1542]. He pointed out that the experience on the exhibition of the motion picture "Born Yesterday" at the Southside, La Tijera, Paradise and Imperial clearly demonstrated that the four theatres could play simultaneously and do well. He testified that his experience at the Southside on that picture supported his conclusion [R. 1542-1543].

Testimony of Syd Lehman. Syd Lehman, the buyer and booker for the Paradise from January, 1950 to August, 1951, who bought and booked for approximately 55 theatres, testified that in his opinion the Paradise was not in substantial competition with the downtown Inglewood theatres, the Academy or the La Tijera or the Southside. The basis of his opinion was that the Paradise had a separate shopping center; that it was a complete

and distinct area unto itself and would not draw any substantial business from any other area. Moreover, he testified that in highly populated areas, such as those in which these theatres were located, the distances between these theatres made it clear that there was no substantial competition. This is because in highly populated areas the area of competition narrows considerably [R. 1592-1593]. Lehman emphasized the fact that the distributors clearly recognized that there was no substantial competition where theatres were located 3½ miles from each other when they played the Southside and the Academy simultaneously. It was thus clear that the Paradise, which was located 4½ miles from the Academy, was not in substantial competition with that theatre [R. 1592].

His experience with the picture "Samson and Delilah," which played day and date in the Paradise and other theatres, demonstrated to him that the Paradise was not in substantial competition with the other theatres.

Testimony of Bryan D. Stoner. The witness Bryan D. Stoner testified that he had been employed for many years by appellant Loew's and from 1945 through 1954 by 20th Century-Fox. Since 1954, he had been employed by Paramount. During the period from 1948 through 1951 he was assistant Western Division Sales Manager with direct responsibility over Los Angeles [R. 2450]. He testified that he had complete familiarity with Westchester and Inglewood.

It was stipulated that the Paradise, exhibiting on a 7-day run in Westchester, would not be in substantial competition with the Loyola [R. 1574].

Stoner testified that there were many pictures that played day and date between the Academy and the Southside or between the Academy and other Fox Theatres in Inglewood [R. 2480].

As to the effect on 20th Century-Fox of exhibiting simultaneously with the Southside Theatre, 3½ miles from the Academy, Stoner testified as follows:

"Q. If the Academy was playing alone, and then it played day and date with the Southside, would the Southside have taken away 30 per cent of the business of the Academy? A. As I recall, our grosses in Inglewood did not seem to depreciate at all when we began to play day and date in the Southside Theatre, which could lead me to believe they were drawing from a different area completely.

Q. In other words, when the Academy was playing alone, and then you played the Southside day and date, you recall that your grosses in the Academy were not affected to any marked degree? A. I couldn't pinpoint the Academy Theatre, as I recall it, but in making our studies after we began the experimentation, our revenue was not affected or depleted due to the fact that we had played the Southside Theatre day and date with some theatre in Inglewood.

Q. Your revenue was not depleted due to playing day and date with some theatre in Inglewood, that is correct? A. To the best of my recollection. It was enhanced, as a matter of fact [R. 3258].

Q. It was enhanced? A. Increased.

Q. Increased. The revenue of the Academy Theatre increased? A. Our revenue from the area.

Q. The revenue from the area was increased when the Southside Theatre was permitted to play day and date? A. To the best of my recollection, yes." [R. 2488-2489.]

Greenberg, the District Manager for Warners, testified the Southside Theatre was not strongly or seriously in competition with downtown Inglewood [R. 2068, 2070].

Greenberg testified that as far as Warners was concerned they would have served day and date between the Paradise and the La Tijera [R. 2126-2127].

There was testimony by Zabel of Fox West Coast, Pirosh of Fox West Coast, Schreiber, Wolff and Lehman that the area of competition is sharply less on a 7-day run than on first run. An expert market analyst, called by defendants, testified that from a survey of the drawing area of the Loyola Theatre, taken in 1951, the overwhelming source of the patronage was within a radius of 4 miles of the Loyola. This was true because it was conceded the Loyola Theatre was, at the same time, a first run and neighborhood theatre [R. 1957-1960]. Since the drawing area for the Loyola was 4 miles on first run and the inference was clear that the second run—the 7-day run—would have a far more restricted drawing area. In fact, the same witness testified that the drawing area of an Inglewood 14-day run theatre was 2 miles [R. 1961].

Other evidence corroborated the fact that in Westchester, as in Inglewood, which areas were both essentially neighborhood theatre areas, the drawing areas of theatres on 7-day run were substantially less than 2 miles. Thus, the evidence showed that the La Tijera and United Artists Theatres, located only 1.9 miles from each other, exhibited pictures on the 7-day run simultaneously with each other [R. 2060-2063]. On occasion, Fox West Coast moved over a picture from its exhibition on the 7-day availability in the Academy to the Fox Theatre in downtown Inglewood located only 2 miles away. Moreover, as was pointed out by Alex Schreiber, in all his letters of August, 1950, the Inglewood theatres on Fox pictures followed the Loyola 4 miles away, and both groups of theatres were tremendously successful.

Testimony was introduced that Columbia permitted the Paradise to play simultaneously with the La Tijera,

the Imperial and the Southside. The La Tijera was less than 2 miles away. On the picture "Born Yesterday" the Paradise, playing simultaneously with the Academy, grossed more than it had on any other picture, thus indicating that playing simultaneously with the La Tijera had no material effect upon the Paradise gross [Pltf. Ex. 45J].

It is clear from this testimony that the jury was entitled to conclude that:

(a) There was no substantial competition between the Paradise and the Inglewood Theatres or the La Tijera; and

(b) That therefore clearance of these theatres over the Paradise was unreasonable; and

(c) That the refusal to license a day and date run was therefore part of the conspiracy between Loew's, Fox West Coast, 20th Century, United Artists and United Artists Theatre Circuit to prevent the Paradise from obtaining 7-day run pictures on equal availability with the theatres in Inglewood;

(d) That requiring the Paradise to bid for the Inglewood 7-day availability against the 7 theatres in Inglewood was arbitrary and unreasonable.

As has been pointed out, 20th Century refused to negotiate with the Paradise for 7-day availability with the Paradise in Westchester on any terms [R. 1578]. Loew's although the evidence showed that the Paradise was not in substantial competition with Inglewood Theatres, would refuse to serve the Paradise unless they would enter into what Loew's termed "competitive bidding" for the Inglewood run [R. 1129 and 1569]. It will be recalled that Hickey, the Loew's witness, testified that at this very time that bidding was being required, he knew that United Artists Theatres and Fox West Coast had agreed to allocate pictures throughout the State of California

[R. 543-553]. Bidding had been carried on from September, 1949 to May, 1950 when Loew's knew that the pictures were to be allocated to United Artists Theatre Circuit. It was apparent that the jury believed and could not have believed anything other than that the bidding request was a sham.

As an example, as has been pointed out above, Loew's insisted on the Paradise bidding for the Inglewood run even before it knew any facts concerning competition between the Paradise and Inglewood theatres [R. 558]. Moreover, the evidence showed that when Marco Wolff submitted bids, Loew's turned down the bid request without any knowledge as to what the gross potential of the Paradise was. Loew's refused to license a single picture to the Paradise in order to determine what the gross potential of the Paradise was on 7-day availability [R. 558]; in the actual execution of the so-called bidding it was clear that Loew's was carrying out the conspiracy. Thus, on a group of pictures as to which Loew's refused to negotiate for a 7-day availability even on pictures which were not sold on bidding but pursuant to "negotiation" [R. 489, 495, 496].

The Fox West Coast handling of this bidding arrangement was clearly demonstrated by the testimony of Greenberg and Marriott. Thus in those situations where Fox West Coast won a bid which would give clearance of Fox another Southside, Fox used the mechanics of waiver of clearance to determine what theatres would play on a simultaneous 7-day availability. Marriott of Universal testified that it was Fox West Coast that determined who would play the 7-day availability; whether or not they purchased the picture [R. 949].

The jury was thus entitled to believe that it was arbitrary and unreasonable:

(a) To refuse a day and date 7-day run to the Paradise; and

(b) to require bidding between the Paradise and non-competitive theatres.

Obviously, the only function of competitive bidding is to determine which of two or more theatres, which are substantially competitive, are to receive the pictures. To take an independent theatre and require it to bid against a chain theatre with which it is not in competition is simply a mechanism for avoiding any real competition in the licensing of pictures. In the instant case, Fox West Coast had available to it all of the product of 20th Century-Fox on the 7-day run. Thus, its programming was assured and it thus had the leverage to use excessive bids in order to assure the fact that the Paradise would be precluded from obtaining pictures on a 7-day run. Thus, the Fox West Coast purpose to prevent the development of competition in Westchester was served.

E. The Conspiracy Prevented the Paradise Theatre From Operating on a Regular Seven-day Run Policy, Forced It to Run Old Pictures or Split Availability Programs and Thus Caused a Loss to the Paradise Theatre of Approximately $38,000.00.

Plaintiff produced evidence which showed that the Paradise Theatre's operation during the 52-week period from August 23, 1950 to September 22, 1951 resulted in a financial loss of $38,000.00. There was no dispute that during this period the Paradise was not able to obtain a single 7-day run picture from Loew's or 20th-Fox for its operation although 70 to 80 pictures were necessary to operate on a 7-day basis. The testimony showed that as a result the Paradise was forced to play pictures released in prior years OR it was forced to play pictures on a 21-day availability or later OR it was forced to play split availability programs in which one picture was on a 7-day availability and the second feature

was on a later availability OR it was forced to hold over pictures from one week to a second week, while a new feature was added, thus depriving it of the access to the patronage which may have attended the theatre during the prior week. There was no dispute that such a policy would necessarily result in loss of patronage and loss of net receipts to the theatre.

There was no dispute as to the testimony that the 7-day run was more financially advantageous to an exhibitor than the policy which the Paradise was forced to adhere to. The testimony was uniform that the 7-day run is the most valuable run for a theatre except only for a Los Angeles first run. There was no dispute that the value of the run determines the value of the pictures on that run.

The testimony was that there were large expenditures for advertising on first run. Thus, it was apparent that the greatest financial benefit to be obtained from this advertising was to operate on an availability as early as possible before the effect of the advertising and exploitation wore off and the attention of the public was drawn to new pictures on first run. There was no dispute that increased gross receipts and increased profits result from operating on an earlier run on a regular basis.

Since Loew's and 20th Century-Fox together distributed approximately 80 pictures during the 52-week period involved here, it was clear that access to these pictures would have made it possible for the Paradise to operate on a regular 7-day run policy.

The evidence also showed that in the absence of the conspiracy, Loew's and 20th Century-Fox would have permitted the Paradise to operate on a 7-day availability. Thus, as we have pointed out above, the evidence was clear that Westchester was an excellent area for theatre patronage on an early run Loew's had no 7-day run

in Westchester and the evidence showed that it would have obtained increased revenues by obtaining a 7-day run in that area. Similarly, 20th Century-Fox had no 7-day run theatre in Westchester and as a distributor, its revenue would have increased from a 7-day run theatre in that area. Counsel for Fox West Coast conceded that if the Paradise were operating on a 7-day run, it would not have been in substantial competition with the Fox West Coast Loyola which operated on a first run [R. 1574]. Thus, it was clear that the over-all benefit to 20th Century-Fox and Loew's from the addition of a 7-day run theatre in the Westchester area would have resulted in the Paradise licensing pictures on this availability in the absence of a conspiracy.

The fact that Columbia, RKO and United Artists adopted this policy was further evidence from which the jury reasonably concluded that in the absence of a conspiracy between Loew's, Fox West Coast and 20th Century-Fox, the Paradise would have operated on a regular 7-day run policy.

The Paradise Theatre was comparable to the Loyola Theatre, which operated on first run, and to the Academy Theatre, which operated on a 7-day run. The profit and loss statements of these two theatres were introduced into evidence [Pltf. Exs. 45Q-1, 45Q-2, 79, 81]. On the basis of these records as to comparable theatres, and upon the basis of his expert experience in the operation of large numbers of thatres for a period of 35 years Schreiber testified that on the 7-day run, the Paradise instead of suffering a loss of $38,000.00 would have obtained a profit of approximately $35,000.00. Schreiber testified in extremely detailed terms as to the items of income and expense of the Paradise Theatre as it in fact operated and as it would have operated on the 7-day availability.

The jury's verdict of $20,000.00 as against three of the groups of defendants was $18,000.00 less than the actual loss of the Paradise Theatre during the 52-week period involved in the case at bar.

Conclusion.

The evidence as to conspiracy and as to the fact of damage and the amount of damages clearly supported the verdict of the jury.

III.

The Rules of Law Applicable to This Case Require the Court to Sustain the Verdict of the Jury and Judgment Below.

The rules of law applicable to an appeal which is based solely upon the question as to whether the trial court should have granted a motion for directed verdict, are well known to this court and need little comment. Long ago, in the Supreme Court decision of *Gunning v. Cooley,* 281 U. S. 90, 94, 50 S. Ct. 231, 233, 74 L. Ed. 720, the court said:

> "In determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

As this court itself said in *Fidelity & Casualty Co. of New York v. Griner* (C. C. A. 9, 1930), 44 F. 2d 706, in

> "considering a case on appeal, we must accept the testimony which supports the verdict, if substantial, and reject the evidence to the contrary; such issues having been determined by the jury."

More recently in *Las Vegas Plumbing Association v. United States* (C. C. A. 9, 1954), 210 F. 2d 732, 742, a Sherman Act antitrust case, this court said:

> "The verdict of a jury will be sustained if there is any substantial evidence in the record to support it. In determining whether the evidence is sufficient to support the verdict, we must consider the evidence in the light most favorable to the government. *Glasser v. United States,* 1942, 315 U. S. 60, 69, 62 Sup. Ct. 457, 86 L. Ed. 680; *Woodward Laboratories Inc. v. U. S.,* 9th Circ. 1952, 198 Fed. 2nd 995.
>
> "The credibility of the witnesses and the probative force of facts introduced in evidence are within the sole province of the jury. *Craig v. U. S.,* 9th Circ. 1936, 81 Fed. 2nd 816, at pages 827, 828; *Coplin v. U. S.,* 9th Circ. 1937, 88 Fed. 2nd 652, at page 664; *Morrissey v. U. S.,* 9th Circ. 1933, 67 Fed. 2nd 267, Certiorari denied, 293 U. S. 566, 55 Sup. Ct. 77, 79 L. Ed. 666."

Moreover, in the light of appellants' brief, it is not unimportant to refer this court to the language of *Tennant v. Peoria and Pekin Union Railroad Co.,* 321 U. S. 29, 88 L. Ed. 520, at which the Supreme Court said:

> "It is not the function of the court to search the record for conflicting circumstantial evidence or to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or the conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions and draws the ultimate conclusions as to the facts. The very essence of its function is to

select from among conflicting inferences and conclusions that which it considers most reasonable. (Citing cases.) That conclusion, whether it relates to negligence, causation, or any other factual matter, cannot be ignored. The courts are not free to weigh the evidence, and set aside the jury verdict, merely because the jury could have drawn differing inferences or conclusions or because judges feel that other results are more reasonable."

A. The Conspiracy Issue.

While these principles seem elementary, yet in this case, as in so many appeals the error of the appellants lies in either this blindness or their unwillingness either to concede that evidence in favor of the appellee exists at all or to concede that the jury was entitled to make the adverse inferences, which it, in fact, made. No better example is present in appellant's brief than on the issue of conspiracy and restraint of trade.

The title of appellant's brief is "Opening Brief of Appellants, Fox and Loew's". One would believe from that title that there were only two appellants and one would believe from a reading of the brief that the key participation of Fox West Coast was a factor in some other case and not in the case at bar. This is not surprising, since in the trial of the case, while the *appellee's* evidence directed primary attention at Fox West Coast and its conspiracy with the appellants, Loew's and 20th-Fox, together with Universal, Warners and Paramount, the participation of the largest theatre circuit in the Pacific area in the conspiracy is unrecognized and unanswered by these appellants.

Thus, in appellant's brief there is no consideration whatsoever given to the testimony against Fox West Coast Theatres. It will be recalled that the testimony showed that the reason that Loew's and 20th Century-Fox,

Universal and Warners refused to permit the Paradise to license day and date was because Fox West Coast insisted on clearance over the Paradise. The testimony was expressly given by Marco Wolff, who represented the Paradise during its early period of operation. A letter was sent by Alex Schreiber to the distributors describing the conversation he had had with Loew's and with 20th Century-Fox and with Universal, Warners, Paramount, Columbia, United Artists and RKO in which each of these distributors had stated that the reason that they would not permit the Paradise to exhibit on a 7-day availability was the insistence of Fox West Coast on clearance over the Paradise and its insistence that the Paradise was in substantial competition. Yet, nowhere in the brief do appellants consider this a fact of participation by Fox West Coast.

It will be recalled that the witness, Marriott, testified that it was Fox West Coast who determined whether a theatre would play day and date with the Academy or would not. He testified that whether or not the Academy or Fox West Coast purchased the picture, it was Fox West Coast that made this decision. This testimony is ignored by appellants.

It will be recalled that Lehman testified that when he sought to obtain pictures on an equal availability with Inglewood from Columbia and from RKO, each of the branch managers informed Lehman that he must obtain the approval of Fox West Coast. In the case of RKO, Lehman called an employee of Fox West Coast and asked permission to play simultaneously with the Fox West Coast theatres and was refused. In the case of the Columbia picture, which opened at the Fifth Avenue Theatre, when Fox West Coast found that Columbia had permitted the Paradise simultaneously, the picture was removed from the Fifth Avenue program.

In specific answer to a question put by the court to Marco Wolff, he testified that all of the distributors

treated the Paradise differently than they did the Southside because Fox West Coast insisted upon clearance over the Paradise Theatre and insisted that the theatres were in substantial competition.

This evidence of direct participation of Fox West Coast in the decision of the film companies refusing the Paradise to operate on simultaneous availability with the theatres in Inglewood certainly gives rise to an inference that determination was the result of conspiracy between Fox West Coast and the distributors involved.

Of course, this evidence does not and need not stand alone; the jury was entitled to consider this evidence and was entitled to consider the background; the fact that Charles Skouras, on behalf of Fox West Coast, prevented any theatre from going into the Westchester area; that he specifically kept a competitor out of that area; that even when the theatre was under construction, he remonstrated with Schreiber, the Paradise president, concerning his going into the territory which Fox had carved out for itself. The jury was thus entitled to consider that Fox West Coast had adopted a plan for doing all that it could to keep out competition from the Westchester area.

The jury was entitled to conclude that when the Paradise opened, Fox West Coast then adopted the plan of doing everything that it could to weaken the competition of the Paradise Theatre. In this context, of course, the jury was entitled to consider the prior relationship which had been established between Fox West Coast, United Artists Theatres Circuit, Warners, Loew's and 20th Century-Fox. It was entitled to consider the fact that when it appeared that Fox West Coast and United Artists Theatres Circuit would be compelled to divorce their pooled theatres which had been used against independent competitors in violation of the antitrust laws, that a new plan was devised to substitute for the prior illegal relationships. The new plan was an informal one made

orally, not in writing. It was a plan whereby Fox, United Artists Theatre Circuit, Loew's, 20th-Fox, and other distributors agreed to allocate pictures in accordance with the desires of Fox West Coast. This agreed allocation, included the allocation of Loew's pictures to United Artists Theatre Circuit where there was no bidding and where there was bidding, included an agreement to allocate between UA Theatres and Fox West Coast to the exclusion of the Paradise. Certainly, express agreement as to restrictive practices to be followed permits a jury to infer the product of conspiracy.

Coming down into the Paradise area, the fact that at the very moment that Schreiber was attempting to obtain pictures from the distributors in March and April, 1950, there was a complete and comprehensive allocation of prroduct engineered by Fox West Coast, United Artists Theatre Circuit and another exhibitor in the area with the connivance of all of the distributors. The evidence showed that this arrangement included a sham bidding arrangement in which each of the distributors send out bid letters, having the advance knowledge that a particular exhibitor was to be allocated the particular product of each distributor.

When the Paradise opened its doors, as has heretofore been described, it was clearly established that it was Fox West Coast's insistence upon clearance over the Paradise, which led to the rejection by the distributors of any right on the part of the Paradise to exhibit on the 7-day availability day and date with Inglewood. Pirosh, the Fox West Coast witness, admitted that he insisted upon having clearance over the Paradise. Bertero, the Fox West Coast president, testified that he informed Pirosh that he should obtain clearance over the Paradise.

In the execution of the clearance arrangements in the Inglewood area over Westchester, the discriminatory efforts of Fox West Coast were self-evident. Thus, in the

case of Universal, Fox West Coast had the veto power on whether the Paradise would be permitted to play simultaneously with it or not. The same thing was true with respect to Warners. The same thing was true with respect to 20th Century-Fox. The inference was clear that it was the Fox West Coast determination that led to the Loew's position that it would not permit Paradise to license an equal availability. It certainly will not do for the appellants to simply ignore this evidence or to ignore the clear inferences that the jury was entitled to make and urge that this does not constitute substantial evidence.

It may be argued by appellants that some of the evidence referred to above has reference to Fox West Coast actions with respect to Warners or Universal product and that these defendants were not found liable by the jury. But the jury is entitled to consider all of the evidence with respect to Fox West Coast in order to determine what its intent and its purpose and its methods were in the existing conspiracy. This is clear from the recent decision of this court in *Bryson v. United States,* 238 F. 2d 657.

The jury decision not to include Universal may well have been based upon the belief by the jury that Universal was coerced into its actions. The jury may have concluded the same with respect and Warners and with respect to Paramount. It will be recalled that Fox West Coast has the largest chain on the Pacific Coast. The jury may have selected Fox West Coast, Loew's and 20th-Fox as the most guilty of the conspirators and eliminated the others on the ground that the coercion showed that whatever action they took was against their will.

Be that as it may, the issue in a conspiracy case with respect to whether a verdict is supported by substantial evidence is not whether the verdict against the remaining defendants is consistent with the verdict in favor of

the others, but whether the verdict is consistent with the evidence. (*Bordenaro Bros. Theatres v. Paramount Pictures, Inc.*, 176 F. 2d 594.)

A significant difficulty with appellant's brief on this point is its calculated technique of relying on testimony by way of explanation and excuse instead of considering the necessary and permissible inferences to be drawn from that testimony, as the jury was entitled to infer. A second calculated technique is the process of dismemberment of testimony on the issues and the attempt to have this court weigh the inferences to be drawn from isolated elements of testimony independent of other aspects of the same issue. A typical example of this technique is the discussion of the incident involving Marco Wolff and Charles P. Skouras. Thus, from the statement by Skouras to an independent exhibitor who desired to build a theatre in Westchester, that he should not come into Fox West Coast territory, the appellants insist that only innocence may be inferred. When this testimony is added to the statements by Skouras remonstrating with the Paradise owner for coming into the district, this statement is assumed to permit only an inference of innocence. When the statements of Joseph Schenck, the executive of 20th-Fox, and a partner with Fox West Coast, to Schreiber which predicts that he would not have any pictures but that Schenck would have available pictures if he obtained a 60% or 70% interest in the Paradise theatre, only innocence can be inferred. When testimony is received as to the agreements between Fox West Coast, United Artists theatres allocating Loew's pictures across the State and allocating the pictures of all distributors wherever the theatres are in competition, again only innocence may be inferred. When testimony is received from the Loew's Pacific Coast Manager, George Hickey, to the effect that wherever bidding was involved, the allocation was arranged and employed, that each of the exhibitor circuits

informed him of that fact and that he has notes and memoranda of those conversations, again appellants insist that only innocence is involved. When an allocation agreement is set up in Inglewood during a substantial period involving all of the distributors and all of the exhibitors in the area, again only innocence can be inferred. When the testimony is produced concerning the insistence of Fox West Coast upon preventing the Paradise from playing day and date, the pattern of monopoly by Fox West Coast in seven day towns, the specific policy of exclusion of independents from simultaneous runs is demonstrated, each of these items of testimony is declared by the appellants' brief to require the inference of innocence.

But declarations by appellants on these points cannot stand examination under the law. Whereas we have pointed out above, this court has long recognized that it is the inferences drawn from the testimony as a whole which the jury is entitled to make and if such inferences, considering the testimony as a whole, constitute substantial evidence of the fact, then this court will not disturb the finding of the jury on that fact.

Certainly, if the jury believed, as it must have believed, that Fox West Coast was the moving influence in the erection and the maintenance of the conspiracy, as well as its beneficiary, then the roles of Fox West Coast and 20th-Fox become clear.

Loew's participation in the allocation of pictures to Fox West Coast and United Artists Theatres Circuit came from the testimony of Hickey. With respect to the Paradise, he testified that the reason that the Paradise was not permitted to play an equal availability, was that there was no theatre in the city limits playing Loew's pictures on the 7-day run. He also testified that all of the theatres in which Loew's played its pictures on the 7-day run were Fox towns. The obvious lack of candor

in the testimony concerning the stated reason for the refusal to permit the Paradise day and date exhibition, together with the real reason, revealed by the fact that all of the 7-day towns were "Fox towns," and the express testimony of agreement by Hickey and Fox West Coast and United Artists Theatres Circuit to allocate Loew's 7-day pictures, certainly permitted the jury to conclude that Loew's was participating in the conspiracy with Fox West Coast.

Moreover, Loew's by contract, entered into an agreement with Fox West Coast to grant clearance on behalf of the Fox West Coast theatres over the Paradise Theatre. Such contract relationships were *per se* illegal if, as was established, the Paradise and the Fox Theatres were not even in substantial competition. Since the jury obviously found that there was not substantial competition, expressly and by written agreement, Loew's entered into the conspiracy with Fox West Coast.

But Hickey's handling of the so-called bidding which, he insisted, the Paradise participate in, is even further evidence. Paradise bids were rejected, even though Hickey testified that it was the custom to permit a picture to be exhibited in a new theatre in order to determine its grossing potentialities. Loew's not only rejected the Paradise request for equal availability prior to its having any knowledge of the competitive relationship between the Paradise and the Fox theatres, but Loew's rejected the Paradise bids without any such knowledge. In fact, Loew's did not exhibit a single picture in the Paradise on the 7-day availability from the day the theatre opened through the end of the damage period, September 22, 1951.

Finally, even on those pictures, which, in the course of the bidding, all bids were rejected, Hickey testified that Loew's negotiated the 7-day run with exhibitors. No

such negotiation and no such offer was made to the Paradise, even though the documentary evidence was introduced to show the constant request by the Paradise to license and negotiate for pictures with Loew's.

In the light of all of this testimony, the jury was certainly permitted and reasonably required to conclude that Loew's participated in the conspiracy with Fox to prevent the Paradise from obtaining a 7-day availability.

The role of 20th-Fox in the conspiracy with Fox West Coast was even more clearly established. Joseph Schenck, an executive of 20th Century-Fox was also the president of United Artists Theatres Circuit. This circuit entered into agreements with Fox West Coast concerning Loew's product and entered into direct agreements with Loew's. Spiro Skouras, the president of 20th Century-Fox, was the brother of Charles P. Skouras, the president of Fox West Coast Theatres and the brother of George Skouras, who, it was stipulated, from 1949 on was an officer of United Artists Theatres Circuit. The knowledge and participation of 20th Century-Fox in the arrangements to allocate pictures in Los Angeles and in the Westchester and Inglewood areas was clearly established.

The evidence clearly showed that 20th Century-Fox's policy was designed to prevent the Paradise from ever becoming a competitor on the 7-day availability in Westchester. Thus, the testimony showed that even when the Loyola did not exhibit a picture, such a picture was not offered to the Paradise, although at the same time, that picture was exhibited in a theatre belonging to the United Artists Theatres Circuit, Inc. The evidence showed that throughout the Los Angeles area, it was the practice to have move-overs, *i.e.,* exhibition of motion pictures at a first run theatre and then the exhibition in a second theatre without the elapse of any time. There was no move-over theatre in Westchester and 20th Century-Fox refused the

Paradise that availability. The evidence showed that 20th Century-Fox participated with Fox West Coast in determining that no 7-day theatre would be permitted to operate in Westchester. Thus, it was clearly Fox West Coast who determined that the Paradise should not exhibit 20th Century-Fox pictures on a 7-day run in Westchester. Although the evidence was clear that there was no competition between the Paradise and the 7-day run theatre which 20th Century-Fox had in Inglewood. The testimony of Stoner, the 20th Century-Fox witness, that when the Southside was permitted to play simultaneously revenue to 20th Century-Fox increased in the area and the continuous refusal to permit the Paradise to play on the 7-day availability in Westchester, where there were no 7-day theatres, corroborate the inference of participation of 20th Century-Fox in the alleged conspiracy [R. 2489].

Appellants would have this court believe that the simple statement of an academic homily that the distributor has a right to sell its own theatre is the answer to a Sherman Act charge, and that this amounts to exemption. But this argument was answered by this court as recently as March 29, 1957. On that date, this court handed down the decision in *Flintkote Company v. Lysfjord, et al.,* March 29, 1957 ..... F. 2d ....., No. 15005.

In that case, appellants, who had been found to have participated in an illegal conspiracy in violation of the antitrust laws by a trial jury, sought to escape the result of the jury verdict upon the assertion of the principle that a seller may choose his own customers. This, it was argued, was an absolute defense to a suit by one who was denied access to the seller's goods pursuant to a conspiracy which was established by the jury's verdict. The court said this:

> "It is true that one engaged in private enterprise may select his own customers, and in the absence of

an illegal agreement, may sell or refuse to sell a customer for good cause, or for no cause whatsoever. But it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That decision, placed in its proper prospective of circumstances and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right, or an act which showed knowing participation in an unlawful conspiracy.

"Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce. He could merely state—'despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I am innocent and cannot be held liable because I say I exercise my business judgment, and I can refuse to sell to anyone, and that is lawful no matter what the circumstances may be.' . . ."

The court answered this propoistion directly.

"The rule of freedom of sale to anyone or no one is not absolute. The *Colgate* case (U. S. 300), 'was not intended to give blanket sanction for individual discretion for refusal to deal. The court soon determined that its holding did not stand to protect a course of dealing which inferentially spelled out the factor of agreement that Colgate lacked. More important, the court's landmark decision in *Federal Trade Commission v. Beechnut Packing Co.,* places any refusal to deal in its business prospective and then against the full facts scrutinizes all pertinent antitrust prohibitions, the trade pattern suggests.

" 'Viewed within the larger business setting, even individually conceived refusals to deal may become an integral element in a violation of Sec. 1 of the

> Sherman Act. . . . Also Sec. 2 may forbid refusal to deal for monopolistic ends. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927)' (Report of the Attorney General's National Committee to Study the Antitrust Laws, March 21, 1955).
>
> "The decisions have placed an evaluated refusal to deal in the business setting in which they appear. While refusals to deal in themselves are legally protected, they are examined in their market context. Only thorough-going factual inquiry into the surrounding business circumstances can characterize a refusal to deal as a part of a restrictive course of conduct incompatible with antitrust objectives."

Thus, as this court held, refusals to deal and the so-called right to sell, are all to be evaluated by the trier of facts.

This principle, of course, is directly applicable to the contention made on behalf of appellant, 20th-Fox, as to the right to sell, here to a corporation in which indirectly it owned all of the stock. The same principles are applicable. It was for the trier of fact to determine whether the refusal to sell a 7-day run to the Paradise was pursuant to a conspiracy with Fox West Coast and Loew's, or whether it was actuated by individual independent business motives. The absolute right asserted by appellants without regard to the facts or circumstances cited above simply ignore the basic principles of law applicable to decisions under the antitrust laws.

This holding by this court is directly in accord with the decisions of the Supreme Court of the United States and the Courts of Appeals of other circuits. Thus, the Supreme Court said, in *American Tobacco Co. v. United States,* 328 U. S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575:

> "It is not the form of combination or the particular means used, but the result to be achieved that the

statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition. . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or in other circumstances as well as in any exchange of words. *United States v. Schrader's Son,* 252 U. S. 85, 44 Sup. Ct. 251, 64 L. Ed. 471."

The application of this principle has been widespread. Thus, in *Parmelee Transportation Co. v. Keeshin,* 144 Fed. Supp. 480, a complaint was filed by the operator of a transfer service which hauled passengers between train stations in the City of Chicago. The complaint alleged that pursuant to a plan, one individual, Hugh W. Cross, because a member of the Interstate Commerce Commission; that one, John L. Keeshin, promised Cross a valuable consideration if Cross would persuade the individual railroad presidents to use their influence to cause the Chicago Terminal Lines to eliminate plaintiff and to transfer the business and the contract to a corporation to be formed by Keeshin. This result was to be accomplished by representations by Cross that he would exercise his influence on the Interstate Commerce Commission in their favor. Ultimately, the contract was transferred.

Defendant railroad companies moved to dismiss the complaint upon the ground that it failed to state a claim. The contentions made by the defendants were as follows:

"The first of those objections takes the form of a syllogism and runs as follows: The fact that the contract with Keeshin for terminal transfer services was

an exclusive one did not make it illegal as a monopoly; that such contract was made by the railroads acting together did not indicate the existence of a monopoly, since they were not competitors they were in a position of a single buyer, and as such free to deal with whom they pleased; therefore, no violation of the antitrust laws has occurred."

The court pointed out

"As in all such arguments, the conclusion must fail if either the major or minor premises is in error. . . . The flaws in the proposition lie in the minor premise; the assumption that the railroads could lawfully act together to grant a transfer contract ignores completely the complaint's allegation that the purpose and effect of the joint action was and is to prevent competition in bidding for contracts for terminal service."

The court said

"Acts otherwise lawful are 'within the prescription of the antitrust statutes, if done for the purposes prohibited by the antitrust laws, *i.e.,* to eliminate competition.'" Citing *Noerr Freight v. Eastern Railroad Presidents Association,* D.C., E. D. Pa., 1953, 113 Fed. Supp. 737, 742; see, also, *Kobe v. Dempsey Pump Co.* (10th Cir., 1950-1952), 198 F. 2d 416, 459; and *Cape Code Food Products v. National Cranberry Association,* D. C. Mass., 1954, 119 Fed. Supp. 900, 907.

The individual acts in *Parmelee Transportation Co. v. Keeshin,* obviously were lawful, *i. e.,* the appointment of individuals to an office in the I. C. C., the execution of an exclusive contract, but the combination of the acts pursuant to a conspiracy violated the antitrust laws.

Another railroad case applying this same principle is *Noerr Motor Freights, Inc. v. Eastern Railroad Presi-*

dents Conference, U. S. D. C. E. E. Pa., 26 L. Wk. 2181. There the gist of the complaint was that the railroads had conspired to use a public relations firm to conduct a propaganda campaign to crystallize motorists resentment against the expense and safety features of heavy truck operation over the roads and to arouse public interest in such new methods of financing public highways as a ton-mile tax. One of the important aspects of the activities was of legislation, and another was the vilification of the trucking industry.

The railroads argued that each of these acts constituted an absolute right. That is, there was a right to obtain the passage of legislation and there was certainly a right to state their opinions as to the existence of evils in the trucking industry. The court quoted from *Slick Airways v. American Airlines,* 107 Fed. Supp. 199, in which there the court had said:

> "While it may be questioned whether any of this alleged activity by defendants of itself constitute illegal conduct, it is fundamental . . . that legal means may be utilized to accomplish the unlawful objective of conspiracy."

The court in the *Noerr* case came to the same conclusion. Thus, the court said:

> "This court is not condemning the field of public relations. It is only condemning as it would be used in this case, as an instrumentality of destruction rather than one of promotion. Neither does the court determine it illegal for an industry to seek any and every proper legislative goal; nor to enlist the support of other persons in obtaining legislation. But it is illegal to use the practices and methods shown by the record of this case to destroy a competitor's good will and to use third parties as fronts to carry out a conspiracy to destroy the competitor."

Again, the principle seems self-evident, and yet the defendants ignore it completely in their brief.

The corporate relationship between Fox West Coast and 20th Century-Fox is, of course, under the antitrust laws, of no moment to the decision made by the jury that a conspiracy existed. In both *Kiefer Stewart Co. v. Joseph F. Seagram & Sons, Inc.,* 332 U. S. 218, and *United States v. Timkin Roller Bearing Co.,* 341 U. S. 593, conspiracy was found between related corporations. These very defendants, 20th Century-Fox Film Corporation and the parent of Fox West Coast Theatres Corp., National Theatres, Inc., were found to have violated the antitrust laws in *United States v. Paramount, et al.,* 334 U. S. 131 (1948).

The fact that one defendant owned the stock of another defendant was of no moment where one of them has a plan for violating the antitrust laws to which the other related corporation adhered. Here, the evidence was clear as to the plan of Fox West Coast to keep out and to weaken competition in Westchester and the evidence was clear that Fox West Coast participated with other corporations in carrying out this scheme that the obvious knowledge and adherence by 20th Century-Fox to the plan of Fox West Coast requires that the same principle of law be applicable to 20th Century-Fox as to any other defendant. (*Milwaukee Town v. Loew's,* 190 F. 2d 561.)

B. Substantial Evidence Supported the Jury's Verdict That the Appellants Conspired to Impose Unreasonable Clearance Against the Paradise Theatre.

The jury was instructed that it was unlawful and a violation of the antitrust laws for the appellants to conspire to impose unreasonable clearance against the Paradise Theatre. Such a clearance would be unreasonable

per se if the theatres obtaining the clearance were not in substantial competition with the Paradise. The appellants do not deny this rule of law.

J. J. Theatres, Inc. v. 20th Century-Fox Film Corp., 212 F. 2d 840.

As summarized in this brief, the evidence introduced was more than adequate to demonstrate that the Paradise was not in substantial competition with the other theatres which obtained clearance over it.

In their treatment of the issue of substantial competition appellants' brief graphically demonstrates the practice of putting partisan blinders on with respect to adverse evidence and ignoring the weakness of the evidence relied upon. The factual testimony of Schreiber, Lehman and Wolff; the inferences to be drawn from the admission that the Southside and the Academy were recognized to be non-competitive; the testimony of the 20th Century-Fox witness Stoner, to this effect, the testimony concerning the restricted drawing area of neighborhood theatres, all of them rendering testimony and evidence supporting the jury verdict is ignored by appellants.

Moreover, appellants ignore the weakness of the evidence which they rely upon. The appellants make a comparison of three pictures exhibited at the La Tijera and Paradise simultaneously and three additional pictures exhibited exclusively at the La Tijera purporting to show that the La Tijera and Southside were not in substantial competition from which a second inference is drawn that the Paradise was in competition with other theatres in Inglewood.

At the outset, this argument ignores a fact which was conceded by literally every witness who took the witness stand. It was conceded that the Paradise and the Southside theatres, located 6.9 miles away from each other, were not in substantial competition with each other. Thus,

the jury was entitled to conclude that factors other than substantial competition must have entered into any differences shown in the relative grosses of a theatre located 6 miles away, such as the La Tijera.

In the case at bar, the appellant simply failed to introduce comprehensive evidence on the subject. No evidence was introduced as to the second features, the season of the year or the state of the weather, or any other of the variable factors which can affect the grosses in a theatre *on a particular day.* Certainly as against the express testimony of their witnesses as to the matter of substantial competition the jury was entitled to give little if any weight to any of the *three-picture* survey *re* the La Tijera and Southside.

Appellants make reference to an alleged survey made on *one* day as the patronage at the Academy Theatre. The survey was testified to by a witness whose credibility was seriously attacked. Thus, the evidence showed that the witness was of the opinion the Paradise and Southside were in substantial competition, although each and every experienced theatre man in the business testified to the contrary. The witness testified that the areas from which theatres draw patronage gets smaller as the run gets later. Thus, he testified that in his opinion, generally, that a first run theatre draws from a wider area than a 7-day run theatre. But his own survey showed that the Loyola Theatre drew from a 4-mile radius and the purported Academy survey showed the Academy drew from the same 4-mile radius. The Loyola Theatre was admitted to be a first run theatre from the first day of its opening, and the Academy Theatre was admitted to be a 7-day run theatre. So there was a direct and definite conflict in the testimony of the witnesses.

In the light of such a discrepancy the jury was entitled to completely ignore the testimony of the witness.

Moreover, the jury was entitled to take into consideration in coming to its conclusion that since the witness was employed by the defense and his only prior employment in these matters had been by defense counsel defending motion picture antitrust cases that there was bias and prejudice in his handling of the survey.

The patent fact was not only that the jury was justified in believing evidence that the Paradise Theatre was not in substantial competition with the La Tijera or any other theatres in Inglewood, but that the issue of substantial competition was used as a deliberate sham. Witness after witness, representing appellants, were called to the witness stand who testified that their reason for refusing a simultaneous run to the Paradise Theatre was that the theatres were in substantial competition, but testimony as to the meaning of the term amply revealed that it had no impact whatsoever on the actual decisions taken.

Appellants again ignore opposing evidence when they argue that it was to the financial advantage of Loew's to refuse the Paradise Theatre a simultaneous run in Westchester. It will be recalled that Stoner, the 20th Century-Fox witness, testified that when the Southside exhibited, for a full year simultaneously with the Academy, the revenue of 20th Century-Fox from the area increased—this despite the fact that the Southside was a larger theatre than the Academy and located 3½ miles away. The evidence showed that Loew's had no theatre in Westchester exhibiting pictures on a 7-day availability; that obviously the revenue of Loew's would increase if it took advantage of the opportunity to tap the Westchester patronage on a 7-day availability. Both Schreiber and Wolff testified affirmatively in support of this proposition.

The appellant, while ignoring all of the evidence on this subject favorable to appellee, insist on argument from distorted charts. A prime example is the use of a com-

parison of gross receipts of the pictures, "King Solomon's Mines" and "Born Yesterday," without recognition that the exhibition period for "King Solomon's Mines" was during the Christmas-New Year holiday, a theatre boom period (App. Br. p. 44). Again appellants' brief argues (p. 46) from a schedule which purportedly shows that out of the ten top grossing pictures at the Paradise, three were Loew's 21-day pictures which had played only after one prior run. It is pointed out that these grosses compared favorably with the remaining seven 7-day pictures which were played earlier simultaneously at the Paradise with other theatres. But the schedule is distorted because it fails to show the artificial restrictions on the 7-day pictures played at the Paradise in that they always played either with old pictures as the second feature which the patrons had seen, or with hold-over pictures, *i.e.,* pictures that had already been exhibited the prior week in the Paradise theatre. For example: "Sunset Boulevard" played with a Universal 14-day picture. The first week of "Born Yesterday" included a 21-day Warners picture; the second week included a 21-day Paramount picture and the third week included an Eagle-Lion picture. The picture "Samson and Delilah" was not truly a 7-day run picture since it had been exhibited prior thereto in the Inglewood area. The Universal picture, "Desert Hawk," was exhibited as a 14-day picture with a second feature; a Columbia picture, "In a Lonely Place," was exhibited with a 14-day picture; a Warner's picture, "Break Through," was exhibited with a 21-day Republic picture. The Warners picture, "Pretty Baby" was exhibited the first week with a 21-day Republic picture. The gross receipts were artifically restricted by the lack of the availability of another 7-day run picture as a program. Had there been such a 7-day run program at the Paradise, obviously these 7-day run pictures would have been far later than the 21-day Loew's pictures which are indicated. No reference is

made to the artificial restriction in appellants' schedule. Moreover, appellants make no reference to box office quality of the comparable pictures, which makes utterly useless a comparison of the pictures.

In their brief, appellant's discuss the film rental received on the pictures "Good By My Fancy," "Glass Menagerie," and "The Enforcer" (p. 48).

A demonstration of the fact that broad conclusions from examples having to do with untested and erroneous samples is clear from the discussion of these three pictures in appellants' brief. Thus, they argue that since the picture "Glass Menagerie" had two 7-day runs, two 14-day runs and one 21-day run and earned film rental of $3,442.00 and since the picture "Good By My Fancy" of 21-day run and earned a film rental of only $1,941.00, that it follows that Warners, by increasing the number of 7-day runs has reduced its total film rental.

The first answer to this contention is shown by the fact that in the Los Angeles area (in contrast to nationwide) Glass Menagerie was about 13% more valuable as a picture box office wise than was "Good By My Fancy." While this does not explain the entire difference, the exhibition situation in Inglewood demonstrates the fallacious character of using a single example. Thus, the picture Glass Menagerie played as the top feature in the Southside and Academy theatres during the week of November, 1950. In both theatres the picture was shown as the top feature. On the picture "Good By My Fancy," however, which played at the Southside, UA and La Tijera, the Southside played the picture as a second feature, with the top Paramount picture "Lemon Drop Kid." The importance here is, as shown by the testimony of Greenberg, the Southside only paid $400 for the picture "Good By My Fancy." The reason was that it is customary in the film business that if the top feature is a percentage picture, as was the "Lemon Drop Kid," the second feature is sold at a minimum top rental.

The evidence also showed that the single 21-day run on "Good By My Fancy" was played at the Imperial Theatre, but even that so-called run was unique, in that it was only for four days (the dates of exhibition of "Good By My Fancy" at the Imperial were from June 6 to 9, 1951). Thus, the picture "Good By My Fancy" was not only an inferior picture, but it was exhibited at the third theatre as the lower half of a double bill, reducing the film rental significantly and for some reason which is totally unexplained in the record the single 21-day exhibition was for half of the usual period. We don't know whether it was the weather, the summer slump, some special event or occurrence or what other factors caused the Imperial to terminate the exhibition.

Since the conclusion sought to be drawn from the appellants is no better than the other figures and other facts and since these facts show their unique character, they were useless to the jury in arriving at their conclusions.

Appellants argue that the refusal of Loew's to grant the Paradise Theatre a 7-day run was because by granting such a run a precedent would have been established for other areas to obtain 7-day runs. Appellants also argue that if they had granted 7-day run to the Paradise additional theatres would have made the same claim in the area. If there is any fact which the jury is entitled to determine it is that the decision was the result of conspiracy and not the result of such considerations. In the case at bar the allocation of product arrived at by agreement of Loew's, 20th-Fox, West Coast and others, was not the result of independent decision by Loew's, but the result of collective action.

C. The Issue of Bidding.

What has been said above with reference to the unlawfulness of employing lawful means for an unlawful end, is directly applicable to the contentions made by ap-

pellants as to bidding. Here again, the substance of the argument made in appellants' brief is that, as to Loew's, Inc., the fact that it refused a day and date availability and required Paradise to bid against theatres in Inglewood, is an absolute defense to a charge under the antitrust laws. But where, as here, the bidding against theatres not in substantial competition and the granting of clearance by Loew's to the Fox West Coast Theatres over the Paradise, was part and parcel of a conspiracy to prevent the Paradise from becoming an effective competitor in the Westchester area, the facts completely destroy appellants' argument.

But in this area, we have the guidance of the Supreme Court of the United States. In *United States v. Paramount, et al.,* 334 U. S. 131 (1948), 20th Century-Fox, Loew's and the parent of Fox West Coast, National Theatre Corporation, were charged with combining and conspiring to violate the antitrust laws in the distribution and exhibition of motion pictures throughout the United States. In general, the charges made in that case were the same as are involved here, *i.e.,* the favoring of the large circuits of the country over the independent exhibitors pursuant to conspiracy. The trial courts' findings in 1946 in *United States v. Paramount, et al.,* was accompanied by injunctive provisions which set up competitive bidding as the substitute for terminating the relationship between 20th Century-Fox and National Theatres Corp., and the other distributor and exhibitor defendants, and also set up competitive bidding as a means for relieving the other ills found to have existed in the *Paramount* case. The remedy was categorically rejected by the Supreme Court. The reasons given by Mr. Justice Douglas are applicable to the case at bar.

Thus the Court pointed out that competitive bidding favored the large circuits with the "longest purse" and

therefore, in the long run, could be used as a means of restraining competition rather than enlarging it. The Court specifically said:

> "Our doubts concerning competitive bidding system are increased by the fact that defendants who own theatres are allowed to pre-empt their own theatres. They thus start with an inventory which all other theatres lack. The latter have no prospect of assured . . . except what they get by competitive bidding. The proposed statement does not offset in any way the advantages which exhibitor defendants have by way of theatre ownership. It would seem, in fact, to increase them." (334 U. S. 131, 165, 92 L. Ed. 1261, 1296.)

The courts have uniformly held that competitive bidding standing alone is not an absolute defense to a charge of violation of the antitrust laws. Thus, in *William Goldman Theatres, Inc. v. 20th-Century-Fox Film Corp.,* U. S. D. C., E. D., Pa., Feb. 11, 1957, CCH Trade Rec. Paragraph 68,638, the complaint by a theatre exhibitor included an allegation that 20th Century-Fox had conspired with others to limit and restrain the plaintiff's ability to compete and toward that end brought into effect competitive bidding, in an effort to deprive the plaintiff of a fair supply of first run pictures and to enable 20th Century-Fox to exact excessive film rental. The allegation was made that 20th Century-Fox had, as a result, refused to license its pictures to plaintiff unless plaintiff would comply with the "competitive bidding" system.

Defendants moved to dismiss upon the grounds that competitive bidding was an absolute bar to a suit under the antitrust laws. The court denied the motion. The court said:

> "As for the first reason, defendants are apparently under the impression that the mere requirement of

competitive bidding for a product prevents conduct and dealings involving that bidding from coming in conflict with the antitrust laws. That is not the law. See *U. S. v. Paramount Pictures,* 334 U. S. 131, 1948; *Maple Drive-In Theatre Corp. v. Radio Keith Orpheum,* CCH Trade Regulations Reports, Par. 68,422 (S.D. N.Y. June 26, 1956)."

As the court there put it, Universal argued that assuming the existence of a conspiracy, competitive bidding as a matter of law terminate any impact on the plaintiff and requires summary judgment. The court denied the motion saying:

"The Supreme Court has recognized the potentiality of competitive bidding as a means of restraining rather than enlarging competition in the exhibition of motion pictures. *U. S. v. Paramount Pictures, Inc.,* 334 U. S. 131, 161 ff., 1948. The opinion in the *Paramount* case does not permit a conclusion that competitive bidding per se, even among competitors, is inconsistent with the continuing attempt to discriminate. The reasonableness of the system must be determined from the manner in which it is operated, the intent of the parties and its actual effect on the plaintiff. Proof that the defendants had been engaged in a conspiracy to discriminate against the drive-ins prior to 1933 certainly would be relevant in evaluating their conduct subsequent to that time."

Bidding among competitors, under the law, is not per se inconsistent with a continuing attempt to discriminate. This is the complete answer to the position taken by appellant.

But, even more significant, is the fact in this case that the evidence showed, that the jury found, that the theatres against whom Loew's required the Paradise to bid were not in substantial competition and that, in fact,

the Paradise and those theatres were not competitors. Thus, it would follow that a jury could consider such competitive bidding between non-competitors as an instrumentality of discrimination.

IV.

There Was Substantial Evidence of the Fact of Damage to Appellee's Business and Property.

There was no dispute that the operation of the Paradise Theatre from September 23, 1950, to September 22, 1951, resulted in financial loss to appellee. Schreiber testified that on a 7-day run policy the Paradise would require 35 to 40 first features and an equivalent number of second features. There was no dispute that during the damage period appellee obtained no 7-day run pictures from appellants Loew's and 20th-Fox and only a handful from the 3 other defendants.

Moreover, even with respect to these pictures appellee was forced to exhibit them at the same time they exhibited older pictures which had been released in previous years or were late availability pictures. That Paradise was forced to hold over part of a program for a second week, while part of the program was new, thus depriving it of access to the patronage which may have been to the theatre during the prior week. As a result the Paradise Theatre was prevented from operating its theatre on a regular 7-day run basis.

There was no dispute that the 7-day run is more advantageous to an exhibitor than the policy which the Paradise was in fact forced to adhere to. There was no dispute that increased profits and increased gross receipts result from operating on an earlier run on a regular basis.

Schreiber testified that on a 7-day run policy he would need 35 to 40 first features and an equivalent number of second features. It was stipulated that Loew's and 20th

Century-Fox distributed 68 pictures during the 1950-51 season. Thus, access to these pictures tendered to RKO would have made it possible for the Paradise to operate on a 7-day run policy. Without access to these pictures, the Paradise was forced to operate on an economically disastrous policy.

The jury was entitled to conclude that the loss of access to 20th Century-Fox and Loew's products resulted in injury damage to the Paradise in that they provided all and certainly some part of the supply which was necessary to operate the Paradise on a 7-day availability. This more than adequately supports the finding of the fact of damage in this case.

Moreover, appellant argue that the fact that Warners, Universal and Paramount were not found liable by the jury indicates that *their* product was in fact available. Appellants assert that no conspiracy was found by the jury with respect to the product of these three companies. This assumption is of course erroneous. The jury found that appellants had engaged "in a conspiracy with each other to monopolize or unreasonably restrain interstate commerce in the licensing of motion pictures to plaintiff for exhibition in the Inglewood-Westchester area on a 7-day run" [R. 2846].

It is appellants who convert this interrogratory into a purported restriction of the conspiracy found to pictures of Loew's and 20th Century-Fox. The jury was entitled and undoubtedly did consider all of the evidence involving Fox West Coast activities and was justified in finding that Fox West Coast, Loew's and 20th-Fox prevented the Paradise from getting the picture of *all* the distributors through *coercion* upon Warners, Universal and Paramount.

Deprivation of all of Loew's and 20th-Fox product *or* of all of the product of these distributors *and* Warners, Universal and Paramount product sustains the jury verdict.

Wolff v. National Lead Co., 225 F. 2d 427, 433 (9th Cir., 1955), is of course completely irrelevant here. There the trial judge found that there was no evidence of conspiracy to send to the jury. In the case at bar the jury has specifically found conspiracy between Fox West Coast, Loew's and 20th Century-Fox. In the *Wolff* case there was no suggestion that the defendants restricted the availability of the so-called "substitute" product. Here the evidence is comprehensive as to the activity of the conspiracy, particularly through Fox West Coast in preventing the Paradise Theatre from obtaining access to Warners, Universal and Paramount product.

Moreover, in the *Wolff* case this court took great pains to emphasize that plaintiffs there made a great amount of profit and that the evidence did not sustain the proposition that an additional profit, larger than the figure shown in that case, would have been realized by an additional supply of titanium. In the case at bar the plaintiff suffered losses and the availability of Loew's and 20th Century-Fox product *certainly* would have made those losses less severe than they were. The jury in allowing only $20,000 in damages may well have concluded that Loew's and 20th Century-Fox product would have made it possible for the Paradise to suffer that much less loss than it had in fact suffered. From all of these grounds the fact of damage adequately appears.

The evidence clearly showed the fact that the Paradise would have obtained a sufficient supply of 7-day run pictures had the conspiracy not been in existence. The Westchester area as a theatre patronage area for early runs was a very successful section of the city. Acting in its own interest without conspiracy, Loew's undoubtedly would have permitted a theatre in Westchester to become the outlet for Loew's pictures there on the 7-day run. Otherwise, with the Loyola Theatre playing substantially all of 20th Century-Fox product Loew's, was totally un-

able to obtain any access to the 7-day run customers in the Westchester area.

Appellee followed the route laid out by cases such as *Bigelow v. RKO-Radio Pictures,* 327 U. S. 251 (1946); *William Goldman Theatres v. Loew's,* 150 F. 2d 738, approved by this court in *Flintkote Co. v. Lysfjord,* ..... F. 2d ....., No. 15005, filed March 29, 1957, in proving damages. Thus appellee produced testimony to show that the Academy Theatre was a comparable theatre operating on a comparable run to that from which the Paradise was erroneously excluded. Of great importance is the fact that appellants introduced *no* evidence of *any other theatre* to counter the testimony of comparability with the Academy. If appellants desired to show that a 7-day run theatre would return *lesser* gross receipts, and that the Academy comparison was inadequate, they need only have turned to the innumerable theatres which appellant Fox West Coast operated for examples. In the Inglewood area, appellants put no testimony in with respect to the Fifth Avenue or the Fox Inglewood or any other theatre in order to provide an alternative guide to the jury. Certainly in the face of this inaction appellant cannot now complain that the guide was inadequate.

Appellants' brief argues (p. 59) that in order to make use of a theatre as a comparable theatre that theatre must be exhibiting precisely the *same* pictures which appellant sought and which were denied to him unlawfully. No case supports this argument. Comparability as to size, equipment, location, run—these are the only tests and even these facts are for the jury to determine. (*William Goldman Theatres v. Loew's,* 150 F. 2d 738; *Milwaukee Towne v. Loew's,* 190 F. 2d 561.)

The decision means anything other than comparability as to physical and locational characteristics having the run or availability sought by the injured plaintiff. In this court's decision in *Flintkote v. Lysfjord* (..... F. 2d .....),

No. 15005, this court describes the three types of evidence generally approved as sound evidence for damages:

(1) Business records of the plaintiff or his predecessor before the conspiracy arose;

(2) Business records of comparative but unrestrained enterprises during a particular period in question;

(3) Expert opinion based on items one or two.

Appellees' evidence concentrated primarily upon items two and three and it supported the jury verdict. The Paradise is somewhat larger; it is also newer. Its expense of operation was somewhat comparable to the Academy, but any changes in the Paradise expense figures were detailed and never seriously questioned.

Appellee's president's expert opinion was also based on all the factors, including the business records of the comparative theatre. The evidence was more than adequate.

A. Appellants Failed to Carry Their Burden of Proof With Respect to the Issue of Mitigation of Damages.

Appellants reconstruct their "fact of damage" argument into an argument which is equivalent to an argument mitigation of damages. Conceding for the sake of argument that the appellee was deprived of Loew's and 20th Century-Fox product appellees argue that the verdict of the jury does not cover Warners, Paramount or Universal (p. 53). As we have argued above, the specific interrogatory answered by the jury showed that they found that these appellants had engaged in a conspiracy with respect to the licensing of motion pictures to appellee on a 7-day availability. The 7-day run conspiracy was charged and was proven. The verdict esablishes that Fox

West Coast coercion pursuant to the conspiracy with Loew's and 20th which had its effect on preventing the Paradise from obtaining Warners, Universal and Paramount products as well.

Moreover, in looking at the verdict only in terms of Loew's, 20th Century-Fox products, appellants had the burden of proof to establish to the satisfaction of the jury that the appellee had not taken reasonable steps to mitigate damages.

In *In re Kellett Aircraft Corp.,* 186 F. 2d 97, the court states the rule universally recognized "whether or not the buyer's obligation to mitigate damages had been discharged" depends on the reasonableness of its conduct. In this connection, "reasonable conduct" is to be determined from all the facts and circumstances of each case and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice cannot complain that one rather than the other was chosen. The rule of mitigation of damages may not be evoked by a contract breaker as a basis for critical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been . . . to the defaulter. One is not obligated to exalt the interest of the defaulter to this own detriment."

Of course, the issue under this principle of law is for the jury. It should be noted that appellants are not urging that appellee could have gone out and negotiated for a 7-day availability of the product of Warners, Universal and Paramount. In fact, the testimony was exactly to the

contrary. Appellants are urging that under the principle of mitigation of damages, although they had deprived the appellee of the product of Loew's and 20th by reason of the conspiracy, and although with that product appellee would have suffered less loss than it did appellee was obligated as to Warners, Universal and Paramount to (a) determine which pictures he could bid on; (b) determine what bids were likely to obtain a successful result; (c) determine that in fact the bids would be accurately and fairly appraised by these compauies and (d) that they would in fact award the picture or a group of pictures to appellee; and (e) the pictures would be awarded at prices which would have made it possible for appellee to play them profitably; (f) that in fact the pictures would have been delivered in accordance with the offer and acceptance.

It should be noted that each of the companies, Paramount, Universal and Warners, asserted the privilege of rejecting all bids; that there was absolutely no assurance whatsoever that any bid would even be accepted, even if it was the highest bid. Of course, the appellees' obtaining of any pictures would turn not only upon what its own bid would be and the evaluation of that bid by the distributor, but upon what the other bidders would do. Thus, there was complete uncertainty in this sense and appellees' action in seeking negotiation with the distributors for an availability which in good faith he believed was sound and reasonable and which from the point of view of the distributors interest was sound and reasonable, was in full compliance with any rule or any mitigation of damages. In any event, this was an issue for the jury and the jury having determined in appellee's favor it is submitted that that finding should not be set aside.

V.

There Was Neither Reversible Error nor Prejudice to the Appellants in the Court's Addition of the Language "in the Absence of a Conspiracy" to Appellants' Proposed Instructions 26, 31a, 34, 31 and 11.

Appellants argue that when the court added the language "in the absence of a conspiracy" to appellants' proposed instructions 11, 26, 31, 31a and 34, that it committed error.

An examination of these proposed instructions as they were submitted, and the position taken by counsel, shows that:

1. As to each of these instructions, except No. 11, (a) appellants stated no grounds for objections to the modifications or stated insufficient grounds for such objections and (b) appellants violated this Court's Rule 18(2) in failing to set forth in their brief the specific grounds of the objections urged at the trial.

2. Each of these instructions as originally proposed by appellants were either erroneous or ambiguous.

3. If the modifications adopted did not resolve the ambiguity created by appellants' form of instruction, that the ambiguity was effectively resolved by the express language of the remaining instructions and by the express finding through a special interrogatory that each appellant participated in the conspiracy.

INSTRUCTION 11. Defendant's proposed Instruction 11, as originally proposed, read as follows:

"Defendants' Instruction No. 11.

"The plaintiff in this case, as an exhibitor of motion pictures, did not have the right to compel any

of the defendant motion picture distributors to grant it a preferred run, or preference in licensing product, or, in fact, to license it any motion pictures. There is nothing illegal in the mere fact that plaintiff could not get the pictures it wanted on the particular run that it wanted." [R. 126.]

Objections to defendants' Instruction 11 were considered at a full hearing by the court. The colloquy concerning this instruction reads as follows:

"The Court: Now comes No. 11. Mr. Corinblit says that if we should insert after the word 'right' on line 4, 'did not have a right as a matter of law' there is no objection as to that.

Mr. Mitchell: No, that is all right.

Mr. Corinblit: Yes, that is right.

The Court: And then he says, in the second sentence: 'In the absence of the conspiracy there is nothing illegal.'

Mr. Mitchell: Let's put that at the beginning of the sentence: 'In the absence of a conspiracy there is nothing illegal.'

Mr. Corinblit: Yes, that is the proposition.

The Court: We will put that in front and with those modifications it will be given. Your next objection is to Instruction 15."

Thus, from the record it is clear that appellants approved the modification and certainly stated no grounds for objection, moreover appellants failed to comply with this court's Rule 18(2), which requires that when the error alleged is to the charge of the court the specification shall set out the part referred to ". . . together with the grounds of the objection alleged at the trial."

Of course the reason appellants did not set out these objections to Instruction No. 11 was because counsel for

appellant Loew's approved the modification by the court. Counsel for appellants Fox West Coast and 20th Century-Fox were silent.

INSTRUCTION 31a.

Instruction 31a, as proposed by appellants, read as follows:

"Defendants' Instruction No. 31A.

"You are instructed, as a matter of law, that the licensing of 7 day availabilities to theatres in the principal suburban cities of the Los Angeles metropolitan area, such as Inglewood, Huntington Park, Pasadena and Glendale, and a refusal of a separate 7 day availability to theatres in less important suburban communities adjacent to those cities is reasonable. Such practice on the part of any or all of the distributor defendants does not furnish any basis for an inference of conspiracy." [R. 378.]

The discussion of this instruction occurs at page 2628 of the record. As that record shows, neither counsel for appellants Loew's nor counsel for appellants Fox West Coast and 20th Century-Fox made a single statement of objection to the modification of instruction 31a. Again, the appellants have failed to comply with this court's Rule 18(2) by failing to set forth the "grounds of the objections" urged at the trial because in fact no grounds were stated.

INSTRUCTION 34.

Appellants proposed Instruction No. 34 reads as follows:

"Defendants' Instruction No. 34.

"(In lieu of Instruction No. 34, filed July 5, 1956.) You are instructed that each defendant distributor had the right, acting individually, to determine how many 7-day runs it would license in the Inglewood-Westchester area regardless of whether or not the-

atres in that area were in 'substantial competition.' You are further instructed that, having determined how many 7-day runs to offer in that area, each defendant had the right, acting individually, to offer them by bidding or negotiating among theatres in that area, regardless of whether the theatres were in 'substantial competition.' The defendant distributors are not required to license a 7-day run to every theatre which was not in 'substantial competition' with some other theatre or theatres." [R. 383.]

The discussion of this instruction appears at R. 2630. The language of that colloquy is as follows:

"The Court: I will refuse 33-C. The next one is 34. This is a substituted 34. I think that is all right if we insert our stock clause, 'in the absence of a conspiracy.'

Mr. Mitchell: Where do you want to put that, your Honor?

The Court: 'You are instructed that each defendant distributor in the absence of a conspiracy . . .'

Mr. Mitchell: We have got 'acting individually,' in there. Do you want both?" [R. 3446.]

"The Court: Well, we will strike out 'acting individually,' and with that modification I will give 34. Now we have 34-A."

Again there was obviously no express objection by counsel—rather tacit approval—certainly no specific grounds were stated for objection. Again this Court's Rule 18(d) was ignored by appellants in their brief.

Appellants make reference to the trial court's ruling that it would be admitted that all parties had objected to the modifications. This was not intended, of course, and could not operate to remove from appellants the burden of stating the *grounds* upon which their objections were based (citation).

INSTRUCTION 26.

As proposed by appellant, Instruction 26 read as follows [R. 71]:

"Defendants' Instruction No. 26.

"Subsidiaries of Twentieth Century-Fox owned and operated the Loyola, Academy, Fifth Avenue and Fox Inglewood from August of 1950 through September of 1951.

"I instruct you that Twentieth Century-Fox in the exercise of its own business judgment, had the right to exhibit all of its motion pictures in the Loyola, Academy, Fifth Avenue and Fox Inglewood Theatres and any other theatres owned and operated by it in such manner and upon such terms and subject to such conditions as may have been satisfactory to it. I instruct you that there was no obligation on the part of Twentieth Century-Fox to offer its pictures to the Paradise Theatre and no inference of conspiracy may be drawn from the fact that it did not do so." [R. 141.]

The discussion of this instruction appears at R. 2604-2606. That discussion reads as follows:

"Your next objection is to 26. I don't see anything wrong with 26.

Mr. Corinblit: Just a minute, your Honor.

The Court: You have got an argument here. I have read your argument.

Mr. Corinblit: Well, your Honor, if you would add—I think we could cover it, that in the absence of conspiracy, your Honor—

The Court: All right.

Mr. Johnston: Your Honor, *you have covered the question of conspiracy in every other instruction proposed by the plaintiff here.* This is the precise instruction with maybe one or two changes to fit this

case as the court gave in the Lynch or James case. We argued that matter out at length in that case.

Mr. Corinblit: Your Honor, on that point—

The Court: I might have been wrong in the Lynch case.

Mr. Johnston: I submit your Honor was not wrong.

Mr. Corinblit: This is what the defendants have insisted upon in the plaintiff's instructions. Every place where we separated a fact from conspiracy, your Honor remembers as we went through them this morning, every place they insisted, you have got to show conspiracy. Now, this is what the defendants are doing themselves. They are separating facts out away from the element of conspiracy. Now, in the absence of conspiracy, perhaps some of these things are permissible. If your Honor would insert, 'I instruct you that in the absence of conspiracy Twentieth Century-Fox could do these things.' Then you have got the instruction correctly stated." [R. 3416.]

"Mr. Johnston: Your Honor, *you have covered fully in other instructions, both requested by the plaintiff and by the defendants, the matter of conspiracy,* and to insert that at every phrase—

The Court: What harm will be done to say, 'I instruct you in the absence of conspiracy.'

Mr. Johnston: Simply that this, standing as it is, is a correct statement of law. There is no question about it.

The Court: I will insert after the word 'instruct,' 'in the absence of a conspiracy.'

Mr. Mitchell: Do you want to put that after the word 'that'?

The Court: 'instruct you that in the absence'—all right, I won't fight with you over the word 'that.'

Mr. Mitchell: It would be a little easier for you to read, I think.

The Court: With that modification, I will give 26. The next objection is to 29.

Mr. Corinblit: Now, your Honor, I am sorry I wasn't fast enough, but on 26 would your Honor look at the last sentence?

The Court: Yes, I looked at it.

Mr. Corinblit: All right. Now, your Honor, in the presence of other facts—

The Court: I can't cover everything in one instruction." [R. 3417.] (Emphasis supplied.)

It should be noted that the only grounds of objection urged by counsel for Fox West Coast and 20th Century-Fox with respect to Instruction 26 were that the matter of conspiracy had been covered in other instructions and need not be covered in connection with this instruction. The importance of this fact lies in the admission by counsel as we will show more comprehensively later, that the issues of conspiracy against the named defendants was made central to the case, and dominated all of the instructions.

Thus the only objection made by appellants at the trial was that the modification of Instruction 26 was superfluous. This ground is of course not urged here and it could not in any event on this record constitute error.

Here again, appellants have failed to comply with this court's Rule 18(2), in that they failed to set forth the grounds urged at the trial for their objection to this instruction, this time obviously because they recognized the insufficiency of the objection at the trial and because they recognized that they were changing their theory of objection for the first time on appeal. Appellants' brief does make reference to a modification raised to appellants' proposed Instruction 27, which instruction is

not embodied in their statement of points on appeal and to which no objection is made in this court. This, of course, does not cure the default with regard to the specific instructions upon which this appeal is based.

Appellants attempt to read their objection made to Instruction 27 back into their objections to Instruction 26 fails for another reason. It is clear from an examination of defendants' proposed instruction 26 that, as proposed, it was an incomplete and ambiguous statute of the law. Thus, it will be noted that Instruction 26 requested the court to state to the jury that 20th Century-Fox in the exercise of its own best judgment had the right to exhibit all of its motion pictures in theatres which it owned in such manner and upon such terms and subject to such conditions, as were satisfactory to it. Standing alone, the instruction is clear error, since if 20th Century Fox *was the participant in a conspiracy* to restrain trade with respect to the exhibition of motion pictures, including its own motion pictures in Inglewood and the Westchester area, then it no longer had such a right. The failure on the part of appellants to include this fact in the instruction precludes them from objecting here since it is established that in order to charge error as to an instruction not given as proposed, it must be correct *as proposed.*

The modification adopted by the Court attempted to clarify the ambiguity of Instruction 26 as proposed by appellant.

At the outset, it should be noted that, literally speaking, the instruction as modified is not an erroneous statement of the law if the original instruction, as proposed by appellants, was not erroneous. Thus, if it was a correct statement of law that 20th Century-Fox, in the exercise of its own best judgment, had the right to exhibit all of its motion pictures in theatres which it owned in such manner and upon such terms and sub-

ject to such conditions as were satisfactory to it, then literally the statement that "in the absence of a conspiracy" 20th Century-Fox had the right, also stated the law correctly. Appellants are required to *infer* from the modified instruction that the Court was instructing the jury that in the absence of a conspiracy, whether or not 20th Century-Fox participated in it, 20th Century-Fox *did not have that right.* Whether or not such an inference was possible from the literal language of the instruction *standing alone,* it is submitted that it was *impossible* when all of the instructions are construed as a whole and when the special interrogatory answered by the jury is examined.

In this action, the Court, for the benefit of the defendants, proposed that special interrogatories be submitted to the jury covering conspiracy as to first run Los Angeles and as to 7-day availability. The interrogatories were prepared by the defendants and submitted to the jury. The extent to which the jury considered these interrogatories is indicated by the fact that they found that there was no conspiracy on the first run and that three out of seven groups of defendants participated in the conspiracy with respect to the 7-day run. Their finding as to participation is express. Thus, the jury had before it an interrogatory which included the names of all of the defendants.

The jury struck out the names of certain defendants only and thus made the finding as to the appellants' express [R. 2846]. In the face of the jury's action, it seems incredible to argue that the jury did not know that it could not find against appellants unless it found that each appellant participated in the conspiracy charged.

The instructions support this proposition even more completely. Thus, the Court told the jury that it "must not pick out one instruction and base (it) conclusion upon one instruction, but (it) must consider all the

instructions, and consider each instruction in relation to the other" [R. 2757]. The Court stated that each defendant was entitled to individual consideration [R. 2763] and that the extent of the conspiracy could not be established as to any defendant by the acts or statements of its alleged co-conspirators in its absence [R. 2764]. The Court required that each defendant's connection with the alleged conspiracy be established by independent proof [R. 2764]. The jury was told that the plaintiff was required to show wrongdoing on the part of each defendant against whom it sought damages [R. 2765] and that no defendant was to be prejudiced because it had been named as a defendant with others in the case [R. 2765].

Further the Court instructed the jury that the fundamental question was whether defendants conspired with each other during the damage period [R. 2772] and that the conspiracy that would be material in the case at bar would be an agreement among the defendants or some of them to deprive the Paradise Theatre of prior runs to which it would have otherwise been licensed [R. 2773].

The court instructed that to show conspiracy a person must combine with someone else to effect its object by means agreed upon [R. 2773].

With respect to the defense of independent action, the instructions were replete with references making that proposition clear. Thus, the jury was instructed that "each defendant had the right, acting independently, to refuse Los Angeles first run to the Paradise and to refuse 7-day availability to the Paradise except by bidding, regardless of whether the theatres required to bid were in substantial competition" [R. 2772]. The jury was told "that separate independent action by each defendant is not illegal under the antitrust laws. Independent action of each distributor would not form the basis of violation; there must be an element of a conspiracy" [R. 2776].

This proposition was repeated again when the Court instructed the jury that if they found "that the decision of the distributor defendants, during the period with respect to license of motion pictures to the Paradise Theatre, was reached independently and in the exercise of its own business judgment, then such licensing could not form the basis of a conspiracy" [R. 2776]. The jury was instructed that it was to consider the reasonableness of the defendant's conduct [R. 2778]; that if identical action by any of the defendants was the result of independent action, then a conspiracy could not be found [R. 2778]. The court instructed that similarity of business practices which resulted from common business solutions to identical problems would not support a conclusion as to conspiracy and that even if the defendants knew what the other defendant was doing with respect to certain business practices, that they still had freedom of action [R. 2779].

Other instructions of the same character appear at R. 2781 through R. 2789.

In the face of these instructions, the ambiguity, if there was one, in the instruction objected to by appellants was certainly harmless.

This same analysis is applicable to each of the five instructions to which objection is made. With respect to each of them, the instructions as proposed were either erroneous or ambiguous since they were not limited by the fact that the abstract rights referred to in each of these instructions were qualified by the obligations under the Sherman Act. (Citation.)

Flintkote Co. v. Lysfjord, ... F. 2d ..... No. 15005;

Lorain Journal Co. v. United States, 342 U. S. 143 (1951).

Each of these instructions, as modified, examined literally (as the appellants make their literal objection) correctly stated the law. If ambiguity was created, the special interrogatory and the other instructions clarified the ambiguity and made it harmless.

A decision applicable here is *United States v. International Fur Workers Union* (C. A. 2, 1938), 100 F. 2d 547. In that case, the Fur Workers Union and others were indicted under the Sherman Antitrust Act, The charge was a conspiracy to restrain and monopolize interstate commerce in fancy fur skins. After a trial, defendants were found guilty. One of the grounds urged on appeal was error with respect to the use of the phrase, "an unlawful plan." The instruction to the jury read as follows:

> "There is no doubt that a labor union has the right to say that it wants to have this condition or the other, and the labor union at times, as a condition to putting men in your plant may say you have to deposit money; that is easily conceivable; but the question here is whether or not this was part and parcel of the plan, of the offenses charged in the indictment, not that they may do a particular thing in and of itself which may be perfectly lawful. The question is whether or not that thing alone without other things, contributed and were part and parcel of an unlawful plan."

Appellants argued that the court's reference "to an unlawful plan" left the jury without guidance as to what plan the court had in mind. The court held that "it must have been obvious to the jury that (the trial court) was referring to the conspiracy as charged in the indictment and as proved upon the trial."

The only decision cited by appellants in support of their argument is this court's decision in *Flintkote Co. v. Lysfjord,* ..... F. 2d ....., No. 15005, filed March 29,

1957. The facts in that case are clearly distinguishable from the facts here.

In that case, the plaintiff had originally sued the manufacturer and a group of distributors for damages suffered as a result of the violation of the antitrust laws. Prior to trial, the distributors were dismissed. Instructions to the jury, which had been prepared on the basis of the presence of numerous defendants, were to have been modified so as to show clearly that only one defendant remained in the case. That was not done. Moreover, the manufacturer's sole defense was that while his distributors may have conspired, he was not a participant thereof.

Out of the four references to questionable instructions made by the court in its decision in the *Flintkote* case, three of them turned upon the fact that plural "defendants" were used when in fact there was only one defendant in the case. The other reference found it to be inaccurate for the trial court to state to the jury that while a seller may select his own customers "under the antitrust laws, it could not do so if there has been a conspiracy."

In the *Flintkote* case, this court said, as to this critical language, "Without interpretation this is an inaccurate expression of the law. It permits a recovery against a defendant who refuses to deal 'if there has been a conspiracy,' irrespective whether or not the defendant then sought to be held participated therein." Plaintiffs can only urge that it might be *inferred* that because of the first sentence (de-emphasized in App. Br.) there was implicitly added to the last sentence the words, "in which Flintkote participated." As we have pointed out above, it is the *appellants* who require the inference in this case in order to convert an instruction which is literally correct into an erroneous one. This is exactly contrary to the facts in the *Flintkote* case. In the case at bar, the

jury was never instructed that the appellants lost any rights because a conspiracy existed.

The strongest argument to be made with respect to the modification of the instructions objected to is that an ambiguity existed. But, as we have shown, the overwhelming impact of the instructions, together with the special interrogatory, make it clear that the jury rendered an accurate verdict.

Conclusion.

This court recently pointed out that "the private antitrust action is an important and effective method of combatting unlawful and destructive business enterprises. The private suitor complements the government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." (*Flintkote Co. v. Lysfjord,* ..... F. 2d ....., No. 15005, dated March 29, 1957.)

In the trial court, appellee was obliged to produce evidence which convinced the jury that the appellants had engaged in a combination and conspiracy to unreasonably restrain and monopolize the exhibition of motion pictures on the 7-day availability, and that the conspiracy injured the plaintiff in his business. The jury found that the proof was ample to establish the conspiracy and to establish the injury to the plaintiff. The trial court found to the same effect.

This proof of antitrust violation is not overcome by protestations that the motion picture industry has long been aware of the impact of the antitrust laws upon the

licensing of motion pictures. The record of these appellants for antitrust violation is too blatant to suppose that conspiracy and discrimination against independent theatres has not been an acceptable business tool for domination of the motion picture industry by these appellants.

In this case, express testimony as to participation in these antitrust violations certainly precludes the application to these appellants of any rule of proof which would give them a preference in the eyes of the law. In essence, appellants' brief seeks this preference.

The sum and substance of appellants' arguments are: that their violations of the antitrust laws are to be tested by purported reasonableness of their *explanations* and *excuses* for their action, and not by the *proof* of conspiracy and unreasonableness of their actions. Appellants' brief gives lip service to the substantial evidence rule, ignores the testimony and the implicit inferences from the testimony, ignores appellee's evidence, and erects rationalizations by discredited witnesses and weak speculative arguments from distorted statistics into an absolute defense.

In essence, appellants' brief makes the argument which the appellant in the *Flintkote* case, *supra,* made, *i.e.,* the argument that "despite my knowledge of a conspiracy which existed, which I knew to be unlawful, I am innocent and cannot be held liable, because I say I exercised my business judgment, and I can refuse to sell to anyone, and that is lawful, no matter what the circumstances may be." This court answered this argument, as it must be answered here, when it said, "but it is not for the seller to finally decide that it was for a good business reason, or no reason, that he refused to deal. That deci-

sion, placed in its proper perspective and circumstance and facts known to the seller, must be judged by the trier of facts, to determine if it was an innocent and lawful exercise of the seller's private right or an act which showed knowing participation in an unlawful conspiracy.

Were it otherwise, there could never be a civil judgment nor any criminal conviction against any manufacturer of products flowing in interstate commerce."

The judgment below should be affirmed.

Respectfully submitted,

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